No. 15-1509

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Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE, ET AL. BY AND THROUGH, CWCAPITAL ASSET MANAGEMENT LLC, SOLELY IN ITS CAPACITY AS SPECIAL SERVICER,

Petitioner,

v.

THE VILLAGE AT LAKERIDGE, LLC,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals erroneously applied a clear error standard of review for determining non-statutory insider status under the Bankruptcy Code where the material facts were undisputed, rather than a *de novo* standard of review applied by the majority of circuit courts that have addressed the issue.

PARTIES TO THE PROCEEDING

The following list provides the names of all parties to the proceedings below:

Petitioner, the appellant below, is U.S. Bank National Association, as Trustee, as Successor-in-Interest to Bank of America, N.A., as Trustee, as Successor by Merger to LaSalle Bank National Association, as Trustee, For The Registered Holders Of Greenwich Capital Commercial Funding Corp., Commercial Mortgage Trust 2005-GG3, Commercial Mortgage Pass Through Certificates, Series 2005-GG3 (the "Trust"), by and through, CWCapital Asset Management LLC ("CWCAM"). CWCAM is the Special Servicer for the Trust.

Respondent, the appellee below, is The Village At Lakeridge, LLC.

Robert Alan Rabkin, M.D. is a party-in-interest who purchased the $2,761,000 insider claim for $5,000, but who has not participated in the appeal.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner U.S. Bank National Association is a wholly owned subsidiary of U.S. Bancorp, a publicly held company. No publicly-held entity owns 10% or more of the stock of U.S. Bancorp.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 CORPORATE DISCLOSURE STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF CITED AUTHORITIES ix

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Introductory Statement 2

B. Bankruptcy Filing, Pertinent Parties, and Key Principals 4

C. Chapter 11 Plan, Disclosure Statement, and Assignment of the Insider Claim 6

D. U.S. Bank's Motion to Designate Rabkin's Claim as an Insider Claim and to Disallow His Claim for Voting Purposes 9

Table of Contents

Page

E. The Bankruptcy Court's Order Granting the Designation Motion in Part and Denying It in Part....12

F. Appeals....14

SUMMARY OF ARGUMENT....16

ARGUMENT....19

I. The Question of Who Is a Non-Statutory Insider under the Bankruptcy Code Is a Mixed Question of Law and Fact....19

A. The Statutory Framework and the Bankruptcy Court's Decision....19

B. The Bankruptcy Court Decided More than a Pure Factual Issue....23

1. Insider Status Is Not a Historical Fact....24

2. Insider Status Is a Mixed Question of Law and Fact....29

II. Mixed Questions Such As Determinations of Insider Status Should Be Reviewed *De Novo* Because They Involve Much More Than a "Neat Comparison of Fact to Law"....34

Table of Contents

Page

A. Questions Applying a Particular Standard, Establishing Norms, Determining Broadly Applicable Policy, or Deciding Ultimate Issues, Are Legal in Nature and Thus Require *De Novo* Review 34

1. The Predominance of Law or Fact Test 37

2. The Historical Test 42

3. The Functional Analysis Test 46

4. The "Ultimate Issue" Test 52

B. All of the Applicable Tests and Considerations for Resolving the Standard of Review for Mixed Questions of Law and Fact Support *De Novo* Review of Non-Statutory Insider Determinations 53

CONCLUSION 57

APPENDIX TABLE OF CONTENTS

Page

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 8, cl. 4 ..... 1a

11 U.S.C. § 101(9) 1a

11 U.S.C. § 101(31) 2a

11 U.S.C. § 102 ..... 4a

11. U.S.C. § 503(c) 6a

11 U.S.C. § 544 ..... 9a

11 U.S.C. § 547(b) 11a

11 U.S.C. § 548(a) 13a

11 U.S.C. § 550(c) 15a

11 U.S.C. § 702(a) 16a

11 U.S.C. § 727(a) 17a

11 U.S.C. § 747 ..... 22a

11 U.S.C. § 1129(A) 23a

Unif. Fraudulent Transfer Act § 1 (1984) 30a

Appendix Table of Contents

Page

Unif. Fraudulent Transfer Act § 4 (1984) 35a

Unif. Fraudulent Transfer Act § 5 (1984) 38a

Unif. Voidable Transactions Act § 1 (1984) 39a

Unif. Voidable Transactions Act § 4 (1984) 45a

Unif. Voidable Transactions Act § 5 (1984) 48a

TABLE OF CITED AUTHORITIES

Page

CASES

Anderson v. Bessemer City,
470 U.S. 564 (1985).....51

Anstine v. Carl Zeiss Meditec AG (In re U.S. Med., Inc.),
531 F.3d 1272 (10th Cir. 2008).....31-32, 33

Associates Commercial Corp. v. Rash,
520 U.S. 953 (1997).....7

In re Bammer,
131 F.3d 788 (9th Cir. 1997)..... 43, 45

Bank of Am. Trust & Savings Ass'n v. 203 N. LaSalle St. P'ship,
526 U.S. 434 (1999).....55

Baumgartner v. United States,
322 U.S. 665 (1944).....19, 52

Bogardus v. Comm'r,
302 U.S. 34 (1937).....39

Bose Corp. v. Consumers Union of United States, Inc.,
466 U.S. 485 (1984).....38

Browning Interests v. Allison (In re Holloway),
955 F.2d 1008 (5th Cir. 1992)..... 32, 34, 46

Cited Authorities

Page

Chandris, Inc. v. Latsis,
515 U.S. 347 (1995) 18, 22, 41

Comm'r v. Duberstein,
363 U.S. 278 (1960) 37, 38, 49

Cooter & Gell v. Hartmax Corp.,
496 U.S. 384 (1990) 51

DHHS v. Smitley,
347 F.3d 109 (4th Cir. 2003) 45

Educ. Credit Mgmt. Corp. v. Jesperson,
571 F.3d 775 (8th Cir. 2009) 44

Educ. Credit Mgmt. Corp. v. Polleys,
356 F.3d 1302 (10th Cir. 2004) 44

Estate of Merchant v. Comm'r,
947 F.2d 1390 (9th Cir. 1991) 38

Fabricators, Inc. v. Tech. Fabricators, Inc. (In re Fabricators, Inc.),
926 F.2d 1458 (5th Cir. 1991) 32, 36, 45

First Nat'l Bank of Durango v. Woods (In re Woods),
743 F.3d 689 (10th Cir. 2014) 18, 42, 43

Flying J, Inc. v. Comdata Network, Inc.,
405 F.3d 821 (10th Cir. 2005) 43

Cited Authorities

Page

Harvey ex rel. Lankenbaker v. United Transp. Union, 876 F.2d, 1235 (10th Cir. 1989) 43

Helvering v. Tex-Penn Oil Co., 300 U.S. 481 (1937).....39

Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709 (1986).....40

Indmar Prods., Inc. v. Comm'r, 444 F.3d 771 (6th Cir. 2006) 43

Koch v. Rogers (In re Broumas), 135 F.3d 769 (table), 1998 WL 77842 (4th Cir. Feb. 24, 1998)..... 32, 36, 46

In re Krehl, 86 F.3d 737 (7th Cir. 1996).....32

In re Kunz, 489 F.3d 1072 (10th Cir. 2007) 22

Long v. Educ. Credit Mgmt. Corp. (In re Long), 322 F.3d 549 (8th Cir. 2003) 45

In re Longview Aluminum, L.L.C., 657 F.3d 507 (7th Cir. 2011).....17, 31, 33, 45

Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996) 46

Cited Authorities

Page

McDermott Int'l, Inc. v. Wilander,
498 U.S. 337 (1991) 18, 40

McLane Co. v. E.E.O.C.,
— U.S. —, 137 S. Ct. 1159 (2017) 18, 34, 42, 46

Miami Police Relief & Pension Fund v. Tabas (In re Florida Fund of Coral Gables, Ltd.),
144 Fed. Appx. 72 (11th Cir. 2005) 32, 33

Miller v. Fenton,
474 U.S. 104 (1985) ..... *passim*

New Era Publ'ns Int'l, ApS v. Carol Pub. Grp.,
904 F.2d 152 (2d Cir. 1990) 43

Ornelas v. United States,
517 U.S. 690 (1996) ..... *passim*

Panduit Corp. v. Dennison Mfg. Co.,
810 F.2d 1561 (Fed. Cir. 1987) 44

Pepper v. Litton,
308 U.S. 295 (1939) 55

Piedmont Minerals Co. v. United States,
429 F.2d 560 (4th Cir. 1970) 44

Pierce v. Underwood,
487 U.S. 552 (1988) 34, 42, 46, 51

Page

Pullman-Standard v. Swint,
456 U.S. 273 (1982) ..... *passim*

RadLAX Gateway Hotel, LLC v. Amalgamated Bank,
566 U.S. 639, 132 S. Ct. 2065 (2012) 7

Salve Regina Coll. v. Russell,
499 U.S. 225 (1991) 33, 47, 49

Schlumberger Res. Mgmt. Servs., Inc. v. CellNet Data Sys., Inc. (In re CellNet Data Sys., Inc.),
327 F.3d 242 (3d Cir. 2003) 43

Schubert v. Lucent Tech. Inc. (In re Winstar Comm'ns, Inc.),
554 F.3d 382 (3d Cir. 2009) 17, 31, 33

Sw. Marine, Inc. v. Gizoni,
502 U.S. 81 (1991) 40

Tenn. Student Assistance Program v. Hornsby (In re Hornsby),
144 F.3d 433 (6th Cir. 1998) 44

Teva Pharms. USA, Inc. v. Sandoz, Inc.,
— U.S. —, 135 S. Ct. 831 (2015) 53

Thomas v. Gen. Motors Acceptance Corp.,
288 F.3d 305 (7th Cir. 2003) 45

Page

Till v. SCS Credit Corp.,
541 U.S. 465 (2004) 7

United States v. Arvizu,
534 U.S. 266 (2002) 49

United States v. Brown,
631 F.3d 638 (3d Cir. 2011) 38

United States v. Gaudin,
515 U.S. 506 (1995) 27

United States v. Gen. Motors Corp.,
384 U.S. 127 (1966) 39, 51

United States v. McConney,
728 F.2d 1195 (9th Cir. 1984) 38, 39

United States v. Parke, Davis & Co.,
362 U.S. 29 (1960) 18, 39

Williams v. Mehra,
186 F.3d 685 (6th Cir. 1999) (en banc) 52

Cited Authorities

Page

STATUTES AND OTHER AUTHORITIES

United States Constitution, article I, section 8, clause 4 5

11 U.S.C. § 101 2

11 U.S.C. § 101(9) 1

11 U.S.C. § 101(31) ..... *passim*

11 U.S.C. § 102 1

11 U.S.C. § 102(3) 21

11 U.S.C. § 503(c) 1, 49

11 U.S.C. § 523(a)(8) 44

11 U.S.C. § 544 ..... 1, 49, 56

11 U.S.C. § 547 56

11 U.S.C. § 547(b) 1

11 U.S.C. § 547(b)(4)(B) 49

11 U.S.C. § 548 ..... 49, 56

11 U.S.C. § 548(a) 1

11 U.S.C. § 550 ..... 49, 56

Cited Authorities

Page

11 U.S.C. § 550(c) 1

11 U.S.C. § 702(a) 1

11 U.S.C. § 702(a)(3) 49

11 U.S.C. § 727(a) 1, 56

11 U.S.C. § 727(a)(7) 49

11 U.S.C. § 747 1

11 U.S.C. § 747(1) 49

11 U.S.C. § 1111(b) 6, 7

11 U.S.C. § 1126(e) 9

11 U.S.C. § 1129(a) 2

11 U.S.C. § 1129(a)(5)(B) 49

11 U.S.C. § 1129(a)(10) 8, 12, 14, 49

11 U.S.C. § 1129(b)(2)(A) 7

28 U.S.C. § 1254(1) 1

H.R. REP. No. 95-595 (1977) *reprinted in* 21
1978 U.S.C.C.A.N. 5963 21

Page

S. REP. No. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787 ..... 21, 55

Uniform Fraudulent Transfer Act § 1 2

Uniform Fraudulent Transfer Act § 4 2

Uniform Fraudulent Transfer Act § 5 2

Uniform Voidable Transactions Act § 1 2

Uniform Voidable Transactions Act § 4 2

Uniform Voidable Transactions Act § 4(b) 56

Uniform Voidable Transactions Act § 5 2

Uniform Voidable Transactions Act § 5(b) 56

HARRY T. EDWARDS, *ET AL.*, FEDERAL STANDARDS OF REVIEW (2d ed. 2013) 24, 31, 33, 34

Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985) 24, 38

Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993 (1986) 35

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported as *U.S. Bank N.A. v. The Village at Lakeridge, LLC (In re The Village at Lakeridge, LLC)*, 814 F.3d 993 (9th Cir. 2016). The decision of the United States Bankruptcy Appellate Panel of the Ninth Circuit (Pet. App. 28a-60a) is not reported in the Bankruptcy Reporter, but is available at *The Village at Lakeridge, LLC v. U.S. Bank National Association (In re The Village at Lakeridge, LLC)*, BAP No. NV-12-1456, 2013 WL 1397447 (B.A.P. 9th Cir. Apr. 5, 2013). The opinion of the United States Bankruptcy Court for the Central District of California granting U.S. Bank's Motion to (A) Designate Claim of Robert Rabkin as an Insider Claim, or (B) Disallow Such Claim for Voting Purposes (August 20, 2012) (Pet. App. 61a-70a) is unreported.

JURISDICTION

The court of appeals entered judgment on February 8, 2016 (Pet. App. 1a-27a), and denied a timely petition for rehearing en banc on March 16, 2016 (Pet. App. 71a-73a). Petitioner filed a timely petition for certiorari on June 13, 2016, which this Court granted in part with respect to Question 2 presented by the petition on March 27, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix reproduces the United States Constitution, article I, section 8, clause 4; sections 101(9), 101(31), 102, 503(c), 544, 547(b), 548(a), 550(c), 702(a), 727(a),

747, and 1129(a) of title 11 of the United States Code; sections 1, 4, and 5 of the Uniform Fraudulent Transfer Act; and sections 1, 4, and 5 of the Uniform Voidable Transactions Act.

STATEMENT OF THE CASE

A. Introductory Statement.

This case squarely raises Justice Stevens' still-unanswered question regarding:

> . . . the much-mooted issue of the applicability of the Rule 52(a) standard to mixed questions of law and fact—*i.e.*, questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.

Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982).

Specifically, this appeal addresses the standard of appellate review that should be applied when reviewing a lower court's determination of whether a creditor is an "insider" under title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (the "Bankruptcy Code"). The Bankruptcy Code sets forth a largely open-ended definition of insider status, listing a series of examples but otherwise leaving it to the courts to decide who is an insider. *See* 11 U.S.C. § 101(31). Accordingly, unless an individual or entity fits within the expressly enumerated examples for statutory insiders under section 101(31), the Bankruptcy Code allows

courts to develop tests for determining who should be treated as a "non-statutory insider."

Developing and applying those tests is a predominantly legal process, not a question of fact. Indeed, in the proceedings below, the relevant historical facts are not disputed. The bankruptcy court did not weigh any evidence to decide historical facts regarding the relationship of the individuals at issue, and, instead, selected five factors, and no others, as the relevant test for "insider" status under the Bankruptcy Code. Yet, despite the quasi-legal nature of this ruling, a split Ninth Circuit panel held that non-statutory insider status is a pure question of fact reviewed for clear error. One panel member dissented and called for *de novo* review in light of the mixed question requiring the application of law to fact. A majority of circuits that have decided the issue (the Third, Seventh, Tenth, and Eleventh) also disagree and apply *de novo* review for the same reasons.

This case presents a paradigm example of why *de novo* review should be required for determining insider status and why deferential review is improper. No material facts were in dispute, and the bankruptcy court announced its own test of relevant facts, a quasi-legal ruling establishing norms for deciding a legal status. As these norms may be used in other cases, they require meaningful appellate review. Appellate courts are much better situated to decide the norms that give meaning and limits to open-ended statutory determinations. For example, the Ninth Circuit refused to consider the bankruptcy court's legal finding that an admitted long-term romantic relationship is insufficient to support "non-statutory insider" status if it does not involve cohabitation, control, the purchase of expensive gifts, or the joint payment of bills or expenses.

Putting aside the seeming arbitrariness of requiring cohabitation when determining whether a purportedly commercial transaction between a girlfriend and a boyfriend is arm's length, the ruling is normative. It applies discrete values gleaned by the court to determine which facts are relevant and which ones are not. Under numerous precedents of this Court, this is quintessential legal analysis requiring *de novo* review.

The alternative outcome is untenable. If bankruptcy courts are allowed to develop their own tests for determining insider status, largely identical factual situations may be treated disparately. Non-statutory insider status is a *legal* status, but, under the Ninth Circuit's standard, its existence will depend on the particular views, values, and even caprice of the deciding judge. Similarly-situated individuals should be treated similarly, not inconsistently, regardless of whether the courtroom is located in Portland or in Reno. *De novo* review is necessary to ensure that insider status under the Bankruptcy Code is subject to a consistent standard.

B. Bankruptcy Filing, Pertinent Parties, and Key Principals.

The debtor and Respondent, The Village At Lakeridge, LLC ("Lakeridge"), owns and operates a commercial real estate complex in Reno, Nevada. Pet. App. 30a. Lakeridge is no stranger to the bankruptcy system, having previously filed a chapter 11 bankruptcy case in 2006 under the name of Magnolia Village, LLC, which culminated in a confirmed plan of reorganization. Bankr. Doc. 82 at 4-5.[1]

1. Unless otherwise noted, all citations to "Bankr. Doc." refer to the docket in the bankruptcy case below.

In June 2011, Lakeridge filed a second Chapter 11 bankruptcy case in the United States Bankruptcy Court for the District of Nevada (the "Bankruptcy Court") to stop receivership proceedings initiated by Petitioner U.S. Bank National Association, as Trustee, as Successor-in-Interest to Bank of America, N.A., as Trustee, as Successor by Merger to LaSalle Bank National Association, as Trustee, For The Registered Holders Of Greenwich Capital Commercial Funding Corp., Commercial Mortgage Trust 2005-GG3, Commercial Mortgage Pass Through Certificates, Series 2005-GG3 ("U.S. Bank") after Lakeridge defaulted on its loan obligations. *Id.* at 5, 9. U.S. Bank is the senior creditor, holding first priority liens on substantially all of Lakeridge's assets, including its real property and improvements located at 6900-6990 South McCarran Blvd. in Reno (the "Property"). *Id.* at 7-8; Bankr. Claim No. 1-2. At the time of the bankruptcy petition, Lakeridge owed $17.6 million to U.S. Bank, which held the debt as successor-in-interest to the original lender. Bankr. Doc. 246 at 2.

Lakeridge has only one member, another limited liability company ("LLC") named MBP Equity Partners 1, LLC ("MBP"). On its bankruptcy schedules, Lakeridge identified MBP as holding a general unsecured claim of $2,761,000.00 allegedly owed by Lakeridge to MBP (the "Insider Claim"). Pet. App. 30a-31a. Other than U.S. Bank's secured claim and the Insider Claim, there are no other creditors of the Lakeridge bankruptcy estate. Pet. App. 31a & n. 4.

Kathleen Skylar Bartlett ("Bartlett"), a member of MBP's five-member board of managers, served as Lakeridge's 30(b)(6) corporate designee and signed the

chapter 11 petition and all related documents on behalf of Lakeridge. J.A. 135-37; Pet. App. 30a-31a & n.5; Bankr. Doc. 82 at 5. Bartlett testified at her deposition that she was a "'representative of both [Lakeridge] and the equity owners'" and was an "'insider' of the debtor." Pet. App. 31a n.5. She admits to having a romantic relationship with Robert Alan Rabkin, M.D., ("Rabkin"), a retired former surgeon, during the events at issue. J.A. 142-43. Rabkin similarly admits to their ongoing romantic relationship. J.A. 128. The key facts regarding their relationship are undisputed.

C. Chapter 11 Plan, Disclosure Statement, and Assignment of the Insider Claim.

In September 2011, Lakeridge filed its Chapter 11 Plan of Reorganization (as amended, the "Plan") (Bankr. Docs. 48, 76, 109) and accompanying Disclosure Statement (as amended, the "Disclosure Statement") (Bankr. Docs. 47, 82). For purposes of this appeal, the Plan identified only two impaired classes of creditors: (a) U.S. Bank's secured claim (Class 1),[2] and (b) the Insider Claim (Class 3). Pet. App. 31a; Bankr. Doc. 82 at 10. The Plan contained the following proposal for these claims:

Class 1—Secured Claim of U.S. Bank: Lakeridge proposed to modify the note payable to U.S. Bank in the amount of the value of the Property with a ten-year term, a balloon payment at the end of the term, an interest rate

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2. The Plan also provided for U.S. Bank's unsecured deficiency claim as a separate Class 2 claim. This claim was removed when U.S. Bank elected to have its entire claim treated as secured pursuant to 11 U.S.C. § 1111(b). Bankr. Doc. 82 at 13-14.

of 4.25%, and amortizing payments based on a thirty-year term. The note would be secured by the Property, but interest would be capped by Lakeridge's "Monthly Net Income." In effect, the note negatively amortized even though U.S. Bank held the senior, secured position on the debt. Alternatively, the Plan provided that Lakeridge, in its sole discretion, could opt to provide U.S. Bank with U.S. Treasury Bonds worth a present value of $10,800,000 plus a stream of payments equal to the amount owing under U.S. Bank's loan documents that matured in 20 years from the effective date of the Plan. In exchange, the Plan required U.S. Bank to release its lien contrary to the requirements of 11 U.S.C. § 1111(b). Bankr. Doc. 82 at 11-13.

Class 3—Unsecured Claims: Lakeridge proposed to pay general unsecured creditors in Class 3 $30,000.00 on the Plan's effective date. Bankr. Doc. 109. MBP was Lakeridge's only general unsecured creditor. *Id.* at 14.

U.S. Bank objected to the Plan. Bankr. Doc. 222. As the only secured creditor, U.S. Bank opposed Lakeridge's proposal that U.S. Bank negatively amortize its debt for a new thirty-year period and reduce it to the value of the Property. *Id.* Because the Plan proposed to impair U.S. Bank's secured claim by reducing Lakeridge's debt to the value of the Property, this was a classic "cramdown" plan in bankruptcy parlance.[3] Pursuant to section 1129(b)(2)(A) of the Bankruptcy Code, a bankruptcy court may

3. This Court has addressed cramdown plans in several cases. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, __, 132 S. Ct. 2065, 2069 (2012); *Till v. SCS Credit Corp.*, 541 U.S. 465, 468-69 (2004) (Stevens, J., plurality opinion); *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 955-57 (1997).

approve such a plan even where a class of secured claims is impaired and does not accept the proposed plan if the plan is fair and equitable and does not discriminate unfairly. Theoretically, the Insider Claim provided MBP with enough voting power pursuant to section 1129(a)(10) of the Bankruptcy Code to confirm the Plan over U.S. Bank's objection, but MBP's position as the sole member of Lakeridge made it a statutory "insider" under section 101(31) of the Bankruptcy Code, which disqualified its vote. *See* 11 U.S.C. § 1129(a)(10). Therefore, as Bartlett later acknowledged, unless a new creditor was found to replace MBP, the Plan was unconfirmable. J.A. 137, 145.

On October 27, 2011, shortly before a hearing scheduled for approval of the Disclosure Statement, MBP assigned the Insider Claim to Rabkin for $5,000. J.A. 61-63. The Notice of Assignment was filed by Lakeridge's counsel, not Rabkin. *Id.*

In November 2011, the Bankruptcy Court approved the Disclosure Statement. Bankr. Docs. 84, 96. At this hearing, U.S. Bank made a "section 1111(b) election" to treat its entire claim as fully secured. For plan confirmation purposes only, the parties stipulated that U.S. Bank would have an allowed secured claim of $17.6 million, Bankr. Doc. 246 at 2, and that the value of the Property as of the Plan confirmation hearing date was $10.8 million. Bankr. Doc. 108 at 1.

When the Plan was submitted to creditors for approval, U.S. Bank voted to reject the Plan and Rabkin voted to confirm it. J.A. 95-102. If allowed, Rabkin's sole vote was sufficient to confirm the Plan, as only a vote of one consenting impaired class was needed. *See* 11 U.S.C. § 1129(a)(10).

D. U.S. Bank's Motion to Designate Rabkin's Claim as an Insider Claim and to Disallow His Claim for Voting Purposes.

In July 2012, U.S. Bank filed a motion (the "Designation Motion") requesting that the Bankruptcy Court designate Rabkin's claim as an insider claim for purposes of section 1129(a)(10) and/or disallow the Insider Claim for voting purposes under section 1126(e) because, among other things, (a) Rabkin was a "statutory insider," having acquired the insider claim subject to the same limitations possessed by the assignor, MBP, who was a statutory insider; (b) Rabkin was a "non-statutory insider" because the overwhelming evidence demonstrated that Rabkin's purchase of the Insider Claim and subsequent vote were not at arm's length; and (c) the assignment and subsequent vote were not made in good faith. J.A. 64-82.

The Bankruptcy Court held an evidentiary hearing on the Designation Motion on August 1, 2012 (the "Designation Hearing"). At the Designation Hearing, the parties presented the following uncontroverted testimony and evidence concerning Rabkin's relationship with Bartlett and his acquisition of the Insider Claim:

> Rabkin and Bartlett were romantically involved at the time Rabkin purchased the Insider Claim from MBP and had remained romantically involved as of the evidentiary hearing, one year later. J.A. 127-28, 142-43.
>
> Rabkin met Bartlett approximately two years before the Designation Hearing when Bartlett served as his real estate agent. J.A. 107, 142.

Although Rabkin and Bartlett did not live together, they were close romantic friends, dated, socialized, had dinner together, saw each other regularly, and even discussed Rabkin's deposition in June 2012. J.A. 121, 127-28, 142-44.

Rabkin and Bartlett did not purchase expensive gifts for one another, did not share checking accounts or other property, and did not make loans to one another. J.A. 133-34, 143-44.

MBP was aware that, due to its statutory insider status, it could not vote its claim to confirm the Plan, but that, if it sold the Insider Claim to a third party, that party might be able to vote the claim. J.A. 137, 144-45.

Bartlett approached Rabkin on behalf of MBP and proposed to sell Rabkin the Insider Claim for $5,000. J.A. 107-08, 146-47.

MBP did not offer or market the Insider Claim to anybody other than Rabkin. Bartlett claimed that MBP chose Rabkin because "he was around. He was in town. And he seemed like the most viable candidate at the time." J.A. 146.

The Notice of Assignment was filed by Lakeridge's counsel, not Rabkin. J.A. 61-63.

Rabkin did not perform any due diligence or investigation regarding the Debtor prior to purchasing the Insider Claim. J.A. 108-09,

123-27. Rabkin's only information regarding Lakeridge prior to purchasing the Insider Claim was obtained from Bartlett and possibly reviewing the rent roll and physically viewing the Property. J.A. 108-09, 123-25.

Rabkin had not previously purchased a claim in bankruptcy and had no familiarity with this type of investment prior to purchasing the Insider Claim. J.A. 127.

Lakeridge did not provide Rabkin with copies of the bankruptcy schedules or any other documents prior to Rabkin's purchase of the Insider Claim, nor did Rabkin request or receive the bankruptcy pleadings or any other documents before or after he purchased the Insider Claim. J.A. 128-29.

The first time Rabkin reviewed any bankruptcy pleadings, including the Plan, was in connection with his deposition. J.A. 111, 128-29.

At the time Rabkin purchased the Insider Claim, Rabkin had no information regarding the potential or likely recovery. J.A. 125. Rabkin did not even review the Plan prior to purchasing the Insider Claim. J.A. 111.

Rabkin testified that he purchased the Insider Claim solely for "investment" purposes and that he believed "there was an opportunity to have a return on [his] investment," but he was aware that he might not receive any return on the

> investment. J.A. 110-111, 123, 133. Nevertheless, even though he had paid only $5,000 for the Insider Claim, J.A. 62-63, and even though the maximum he could be paid under the Plan for his $5,000 "investment" was $30,000, Bankr. Doc. 109, Rabkin rejected an initial offer by U.S. Bank to purchase the Insider Claim for $50,000 and then a second offer to purchase it for $60,000 (a 1,200% return). J.A. 117, 121, 130-31. Rabkin characterized the latter offer as being "for a substantial amount of money." J.A. 117.

None of the above facts is disputed, and none is controverted by any other evidence.

E. The Bankruptcy Court's Order Granting the Designation Motion in Part and Denying It in Part.

At the conclusion of the hearing, the Bankruptcy Court orally granted the Designation Motion in part, ruling that Rabkin's vote could not be considered to determine acceptance of the Plan under 11 U.S.C. § 1129(a)(10) because Rabkin had assumed MBP's insider status when he acquired the Insider Claim. Accordingly, the Bankruptcy Court entered an order holding, among other things, that the Plan was unconfirmable because Lakeridge did not have the consenting, impaired class necessary to confirm the Plan (the "Designation Order"). Pet. App. 68a. In making its ruling, the Bankruptcy Court applied the general law of assignment to preclude an assignee of an insider claim from voting to confirm a plan. *Id.* at 67a-68a. Based on this finding, the Bankruptcy Court denied plan confirmation. *Id.* at 68a.

The Bankruptcy Court also found that Rabkin was not a non-statutory insider. It did not articulate what legal standard or test it had chosen to apply to the facts. Instead, the court concluded that Rabkin was not a non-statutory insider because Rabkin did not: (i) exercise control over Lakeridge and was not controlled by Bartlett; (ii) cohabitate with Bartlett or pay her bills and expenses of Bartlett (nor did Bartlett pay his bills or expenses); or (iii) purchase expensive gifts for Bartlett or receive expensive gifts from her. *See* Pet. App. 66a. The Bankruptcy Court explained that it had identified these characteristics based upon its own review of "insider" cases:

> The cases that have found non-statutory insiders have involved generally cohabitation, longer periods of association, associations in which the property that the parties become economically entwined, they share checking accounts or sign on each other's checking accounts. They use each other [sic] credit cards. They share each other's property. There was not any of that sort of activity in this case. So I'm not finding that that would support it. I don't think that there was any control by either Dr. Rabkin or Ms. Bartlett . . . .

J.A. 153-54. The court did not address in its ruling the fact that Rabkin and Bartlett had admitted to what apparently was a boyfriend/girlfriend romantic relationship at the time of the assignment. Finally, the court rejected U.S. Bank's contention that the assignment to Rabkin and Rabkin's subsequent vote were not made in good faith. Pet. App. 67a.

U.S. Bank prevailed, however, in its request to exclude Rabkin's vote, as the Bankruptcy Court ruled that MBP's assignment to Rabkin transferred MBP's insider status to him. Pet. App. at 67a-68a. Once the court classified Rabkin's vote as the vote of an insider, Lakeridge lacked the requisite approval of a non-insider class of consenting creditors necessary for cramdown.

F. Appeals.

Lakeridge appealed the Designation Order, asserting that the Bankruptcy Court had erred by denying Plan confirmation on the basis that Rabkin had acquired statutory insider status by purchasing the Insider Claim. U.S. Bank cross-appealed from the portion of the Designation Order that had concluded that Rabkin was not a non-statutory insider for purposes of Section 1129(a)(10). *Id.* U.S. Bank also appealed the Bankruptcy Court's ruling finding no bad faith in the assignment to Rabkin or in Rabkin's vote to approve the Plan. J.A. 28-29, 51-52; Pet. App. 36a.

On April 5, 2013, the Bankruptcy Appellate Panel for the Ninth Circuit Court of Appeals (the "BAP") reversed the Bankruptcy Court's holding that Rabkin's vote could not be considered to determine acceptance of the Plan, and affirmed the other rulings, including the conclusion that Rabkin was not a non-statutory insider. Pet. App. 28a-60a. On April 19, 2013, U.S. Bank appealed to the Ninth Circuit. J.A. 1-2, 34.

On February 8, 2016, the Ninth Circuit issued a published, divided decision affirming the BAP decision. Pet. App. 1a-27a. In a separate, unpublished decision

issued the same day, the Ninth Circuit affirmed the Bankruptcy Court's rulings that the Insider Claim was neither assigned to Rabkin nor voted in bad faith. J.A. 157-60.

In the published decision, the Ninth Circuit unanimously held that a vote cast by a third-party assignee of an insider claim could be counted for purposes of confirming a cramdown plan even though the claim could not have been counted had the vote been cast by the original claimant. Pet. App. 10a-13a, 18a. The general law of assignment did not apply to the sale of insider claims because (a) insider status is not a "property of a claim," and (b) a person's insider status is "a question of fact that must be determined after the claim transfer occurs." Pet. App. 10a-13a.

In a 2-1 split decision, Judges Smith and Lasnik (the "Panel majority") elected to apply a clearly erroneous standard of review for determining whether Rabkin was a non-statutory insider and deferred to the Bankruptcy Court's determination of Rabkin's non-statutory insider status as a "factual" finding. Pet. App. 14a-15a & n.13, 16a-18a. Specifically, the Panel majority stated that, while it reviewed *de novo* the Bankruptcy Court's definition of non-statutory insider status, it "analyze[d] whether the facts of this case are such that Rabkin met that definition, which is a purely factual inquiry and properly left to clear error review." Pet. App. 15a n.13. But the Panel majority suggested that its conclusion might have been different had it weighed the evidence differently. *Id.* at 15a-16a & n.14.

In dissent, Judge Clifton argued that the Panel majority (a) improperly applied a clearly erroneous standard of review rather than the *de novo* standard of review applied by other circuits, and (b) failed to apply the arm's length test for determining non-statutory insider status as adopted by other circuits. Pet. App. 19a-27a. He noted that:

> The majority opinion states three separate times . . . that we cannot reverse under the clear error standard simply because we would have decided the case differently, a telling sign that even the majority recognizes that support for the finding is thin at best . . . . But my dissent is based on far more than a mere alternative view of the evidence. I cannot fathom how anyone could reasonably conclude that this transaction was conducted as if Rabkin and Bartlett were strangers.

Pet. App. 24a-25a.

On March 27, 2017, this Court granted certiorari to decide whether the Ninth Circuit erred in applying a clearly erroneous standard of review to the determination of non-statutory insider status. J.A. 161.

SUMMARY OF ARGUMENT

1. The determination of non-statutory insider status is a mixed question of law and fact.

a. The Bankruptcy Code's definition of "insider" is open-ended, providing enumerated examples

of who is an insider but no standards to apply to other situations. *See* 11 U.S.C. § 101(31). According to the legislative history, the term was intended to apply to individuals and entities with such a close relationship to the debtor (such as control) that their transactions were not at arm's length. The circuit courts have applied this broad standard as their test for who is an insider, leaving it to the bankruptcy courts to determine specific relevant factors.

b. In the proceedings below, the Bankruptcy Court selected five factors to determine whether the relationship at issue was sufficiently "close." No standard was applied for determining whether the transaction was "arm's length." The Bankruptcy Court did not determine any historical facts, as the relevant facts were all undisputed. Instead, the Bankruptcy Court filled the gap in the open-ended statutory definition by establishing its own norms and applying them to the undisputed facts. This analysis is substantially legal or quasi-legal and presents a classic mixed question of law and fact, as four circuits have found. *See, e.g., In re Longview Aluminum, L.L.C.*, 657 F.3d 507, 509 (7th Cir. 2011); *Schubert v. Lucent Tech. Inc. (In re Winstar Comm'ns, Inc.)*, 554 F.3d 382, 394-95 (3d Cir. 2009).

2. This mixed question of law and fact requires *de novo* appellate review.

a. This Court has used four different tests to determine the proper standard for reviewing mixed questions of law and fact. Under each test, the standard of review for determining non-statutory insider status should be *de novo*.

(i) *Predominance of law or fact.* Where a mixed issue is predominantly legal, the standard of review is *de novo*. *See Miller v. Fenton*, 474 U.S. 104, 114 (1985). Because the question here is whether the Bankruptcy Court "applied the proper standard to essentially undisputed facts," *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960), the issue is predominantly legal and subject to *de novo* review. This Court's maritime cases applying the Jones Act are analogous, requiring *de novo* review of trial court determinations of what it means to be a "seaman." *See McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991); *Chandris, Inc. v. Latsis*, 515 U.S. 347, 355-72 (1995).

(ii) *Historical practice.* The Court's next test, "the 'history of appellate practice,'" *McLane Co. v. E.E.O.C.*, — U.S. —, 137 S. Ct. 1159, 1166 (2017) (citation omitted), further supports *de novo* review. Not only is *de novo* review the majority rule among those circuits to consider the standard of review for determining insider status, but it also comports with the circuit courts' longstanding practice regarding other mixed questions of bankruptcy law and fact. *See, e.g., First Nat'l Bank of Durango v. Woods (In re Woods)*, 743 F.3d 689 (10th Cir. 2014) (applying *de novo* review to a determination of whether debt for principal residence had "arisen out of" a "farming operation").

(iii) *Functional considerations.* A third test considers whether the trial court or the appellate court is best equipped to decide the issue. Here, numerous factors favor *de novo* review: the lack of factual disputes and credibility issues; the need for uniform standards and consistent outcomes as to who is an "insider"; and the value-based norms that courts must develop to apply the Bankruptcy Code, which are fundamentally legal in

nature. *See, e.g., Ornelas v. United States*, 517 U.S. 690, 695-98 (1996). Appellate courts, not trial courts, should have ultimate responsibility for deciding the applicable test for determining insider status.

(iv) *Ultimate issue.* The determination of insider status resolves the ultimate issue in this case and "'clearly impl[ies] the application of standards of law.'" *Pullman-Standard v. Swint*, 456 U.S. 273, 286 n.16 (1982) (quoting *Baumgartner v. United States*, 322 U.S. 665, 671 (1944)). Because the issue here necessarily implicates legal standards, *de novo* review should be required. *See id.*

b. Insider status is too important an issue under the Bankruptcy Code to be subject to disparate rulings and tests that vary according to the predilections of individual bankruptcy court judges. It requires an objective test that results in consistent outcomes so parties know the rules in advance of entering into these transactions. As the issue satisfies each of this Court's tests, the standard of review for determining non-statutory insider status should be *de novo*.

ARGUMENT

I. The Question of Who Is a Non-Statutory Insider under the Bankruptcy Code Is a Mixed Question of Law and Fact.

A. The Statutory Framework and the Bankruptcy Court's Decision.

The ultimate question in this case—how appellate courts should review a bankruptcy court's decision as to whether an individual is a "non-statutory" insider under the Bankruptcy Code—addresses, to some degree, an

issue of statutory construction. No fixed definition of "insider" is set forth in the Bankruptcy Code.

The debtor, Lakeridge, is an LLC with only one member, MBP, itself an LLC managed by a board of five members. Bartlett is one of MBP's board members and an insider. Pet. App. 31a & n. 5. For assessing whether Rabkin should also be treated as an insider, the Bankruptcy Code provides the following guidance:

(31) The term "insider" includes—

***

(B) if the debtor is a corporation—

(i) director of the debtor;

(ii) officer of the debtor;

(iii) person in control of the debtor;

(iv) partnership in which the debtor is a general partner;

(v) general partner of the debtor; or

(vi) relative of a general partner, director, officer, or person in control of the debtor;

(C) if the debtor is a partnership—

(i) general partner in the debtor;

> (ii) relative of a general partner in, general partner of, or person in control of the debtor;
>
> (iii) partnership in which the debtor is a general partner;
>
> (iv) general partner of the debtor; or
>
> (v) person in control of the debtor;
>
> ***

11 U.S.C. § 101(31). The enumerated categories of section 101(31) are considered insiders per se.

These enumerated categories are illustrative and not exhaustive or limiting. *See id.* at § 102(3) ("'includes' and 'including' are not limiting"). Therefore, insiders may be found in numerous other circumstances beyond the enumerated categories. These are commonly known as "non-statutory insiders." *See* Pet. App. 9a (explaining the difference between statutory and non-statutory insiders).

Although the Bankruptcy Code fails to define an insider beyond the enumerated examples, the legislative history provides a widely cited discussion of the general concept: "An insider is one who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arms [*sic*] length with the debtor." S. REP. No. 95-989 at 25 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5810; H.R. REP. No. 95-595 at 312 (1977) *reprinted in* 1978 U.S.C.C.A.N. 5963, 6269. "Non-statutory insider" thus is a catch-all category for creditors who are comparable to the enumerated

examples of "statutory insiders." Pet. App. 13a, 16a-17a. The term "non-statutory insider" actually is a bit of a misnomer, as it addresses which creditors beyond the enumerated examples nonetheless constitute "insiders" under section 101(31). As a result, the determination of who is a non-statutory insider itself necessarily involves a question of statutory interpretation as applied to certain facts, and thus, it inherently has a fundamentally legal complexion. *See Chandris, Inc. v. Latsis*, 515 U.S. 347, 369 (1995) (requiring *de novo* review of trial court's determination of whether maritime employee is a "seaman" under the Jones Act: "Because statutory terms are at issue, their interpretation is a question of law and it is the court's duty to define the appropriate standard.").

The circuit courts of appeal have formulated various general standards to determine when creditors would otherwise be considered insiders. Most agree, however, that the question involves a determination of whether the creditor's relationship to the debtor is close enough to command preferential treatment and thereby hold an advantage over other creditors, resulting in a transaction that is not negotiated at arm's length. *See, e.g.*, Pet. App. 13a-14a (Ninth Circuit's ruling that a creditor is a non-statutory insider when "(1) the closeness of its relationship with the debtor is comparable to that of the enumerated insider classifications in § 101(31), and (2) the relevant transaction is negotiated at less than arm's length") (citation omitted); *In re Kunz*, 489 F.3d 1072, 1078-79 (10th Cir. 2007) (discussing tests for determining closeness of relationship). This "standard" provides only general guidance. It does not say which factors are relevant to determining "closeness" or "arm's length," nor does it specify a particular quantum of "closeness" that must be

reached. The question, therefore, is whether bankruptcy courts should be accorded virtually plenary discretion to determine the specific tests to apply when analyzing the facts.

In its decision below, the Bankruptcy Court concluded that Rabkin was not an insider by determining for itself which relevant facts would determine the outcome. *See* J.A. 153-54; Pet. App. 66a. Reviewing decisions by other courts, it (a) found five factors commonly present in other courts' determinations that a creditor was an insider, and then (b) ruled that none of these five factors applied to Rabkin. *See id.* The issue before this Court does not address the second question, whether the historical facts of the case satisfy the five factors identified by the Bankruptcy Court from its canvass of cases, but rather the first question, whether the Bankruptcy Court's selection of these five factors alone is a correct interpretation of the statute. In other words, is a trial court's determination of *how* to decide whether a creditor is a non-statutory insider reviewed *de novo* or for clear error?

B. The Bankruptcy Court Decided More than a Pure Factual Issue.

Standard-of-review questions generally fall into three categories: issues of fact subject to clearly erroneous review; issues of law subject to *de novo* review, and mixed issues of law and fact, which are subject to considerable debate over which of the two standards of review should apply. Here, the Bankruptcy Court's methodology for deciding how it should decide whether Rabkin is a non-statutory insider is either a mixed question of law and fact or a pure question of law, but definitely not a pure question

of fact subject to the minimal, highly deferential review as the Panel majority held. *See* Pet. App. 8a, 11a, 15a n.13.

1. Insider Status Is Not a Historical Fact.

The determination of what factors a bankruptcy court should weigh in deciding whether a creditor is a non-statutory insider is not a question of historical fact. Historical facts involve questions that are answered or proved "at least to some significant degree of probability, by inferences from evidence." HARRY T. EDWARDS, ET AL., FEDERAL STANDARDS OF REVIEW 7 (2d ed. 2013). They do not require judicial determination of broad, generalized governing principles and instead apply laymen's "logic and human experience to the received physical, documentary, and testimonial evidence." *Id.*; *see also* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 235 (1985) (factual findings "respond to inquiries about who, when, what, and where"). Because the question here involves "'whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated,'" the issue is not strictly factual and therefore, at minimum, "is a mixed question of law and fact." *Ornelas v. United States*, 517 U.S. 690, 696-97 (1996) (brackets in original) (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982)). Indeed, the most critical facts at issue below are undisputed.

The Bankruptcy Court did not apply a specific legal standard, but, rather, wove together a five-factor test of what it perceived to be the key characteristics of insiders in other cases decided by other courts. It stated:

> The cases that have found non-statutory insiders have involved generally cohabitation, longer periods of association, associations in which the property that the parties become economically entwined, they share checking accounts or sign on each other's checking accounts. They use each other [sic] credit cards. They share each other's property. There was not any of that sort of activity in this case. So I'm not finding that that would support it.
>
> I don't think that there was any control by either Dr. Rabkin or Ms. Bartlett . . . .

J.A. 153-54. This is a paradigm example of a mixed question of law and fact:

> When, however, a controlling law is defined pursuant to abstract legal norms or principles, trial-level decision making necessarily involves more than a neat comparison of fact to law. It requires, instead, a nuanced assessment of characterization of the historical facts in light of the governing legal norms. In other words, when a legal principle is only abstractly defined, it serves not as a standard against which the historical facts can be measured, but rather as something more akin to a general guide for the exercise of considered judgment. The conclusions resulting from the exercise of this sort of judgment are referred to as "mixed finding[s] of law and fact[.]"

EDWARDS, ET AL., *supra*, at 8 (citation omitted). As this Court has explained in its classic formulation, mixed questions are those in which "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard*, 456 U.S. at 289 n.19. Such is the exact situation here. Because the historical facts were undisputed, the Bankruptcy Court was required to engage in legal analysis to apply the Ninth Circuit's definition of a non-statutory insider (a close relationship comparable to the enumerated examples and the absence of an arm's-length transaction) to the undisputed facts.

The Bankruptcy Court, however, did much more than apply a legal principle to established facts. It made a legal or quasi-legal ruling as to which factors must be considered in deciding non-statutory insider status and, implicitly, decided that other factors are not material. *See* J.A. 153-54; Pet. App. 66a. For example, the court found that the existence or lack of cohabitation as highly pertinent to the statutory question, yet it gave no weight to the existence of an intimate romantic relationship without cohabitation. The court's selection of relevant factors based on circumstances *in other cases* (none of which was cited by the court) is a quintessential legal judgment, not a factual determination based on considerations unique to that particular case.

The Bankruptcy Court made judgments about how "close" a relationship must be to reach insider status. Again, this is an exercise in standard-making, a determination of quantum that is just as relevant to deciding the issue

as is a determination of the relevant factors. If one court decides that an enduring close platonic friendship is just as significant as a romantic relationship, and another court decides that it is not, and if that is the lone distinction between the cases, the disparity in outcome would result from inconsistent standards, not inconsistent facts. These questions are treated as issues of law precisely to avoid such untenable inconsistencies in outcome.

The skimpy nature of the five factors selected by the Bankruptcy Court reinforces the legal nature of its ruling. Given the Ninth Circuit's amorphous definition of an insider (close relationship and the lack of an arm's length transaction), the five factors hardly are sufficient. The cohabitation factor, for example, is far more arbitrary than logical—surely, the closeness of the individual's personal relationship to the debtor should matter at least as much as whether they share the same roof. By selecting these factors as pertinent and excluding others, the court effectively created its own minimalist test, one that it or other courts could and presumably would apply in future cases.

This judicial determination of relevance is a quintessential legal conclusion. *See United States v. Gaudin*, 515 U.S. 506, 520-21 (1995) (distinguishing between materiality or relevance as ground for excluding evidence from trial, a legal issue for the court and not a factual question for the jury, and materiality as an element of a criminal offense, which is principally factual and thus decided by the jury and not the court). No deference should be owed to a judicial decision that applies the broad tests of "closeness" and "arm's length transaction" in such a narrow and restrictive manner that broad swaths of

seemingly pertinent facts are *categorically* excluded from consideration solely because they supposedly do not match up with some of the facts found in other cases reviewed by the Bankruptcy Court.

As Judge Clifton remarked, the Bankruptcy Court did not apply any test for determining whether the transaction was at arm's length as required by the Ninth Circuit. Pet. App. 24a. As a result, numerous highly relevant facts were ignored by the Bankruptcy Court without any apparent reason.[4] Without a test, the analysis is subject to the

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4. A host of undisputed facts were never considered by the Bankruptcy Court even though their potential relevance towards its determination of whether the transaction was arm's length would appear obvious:

- Rabkin's and Bartlett's close romantic and business relationship, J.A. 127-28, 142-43;
- MBP's failure to shop the Insider Claim to anybody other than Rabkin, J.A. 146;
- Lakeridge's failure to serve Rabkin with any bankruptcy papers, J.A. 129;
- Rabkin's lack of knowledge about the bankruptcy case or the proposed treatment of the insider claim under the plan, J.A. 125, 129;
- Rabkin's failure to review other relevant documents including the notice of assignment of claim, the disclosure statement, the plan, or bankruptcy schedules, J.A. 129;
- Rabkin's lack of due diligence, J.A. 108-09, 123-27;
- The tremendous disparity between the consideration and the potential value of the claim, J.A. 62; and

vagaries of a bankruptcy court's own views, which would inevitably lead to disparate results.

All of these consequences reflect the same core truth. Because the legal definition of a non-statutory insider is so vague and amorphous, the bankruptcy courts must develop their own standards for determining *how* to decide when a creditor is or is not a non-statutory insider, i.e., *how* to consider the facts. Those decisions are not determinations of historical fact.

2. Insider Status Is a Mixed Question of Law and Fact.

The Panel majority devotes scant attention, if that, to the pivotal threshold question of whether the issue is factual, legal, or mixed. Its standard of review discussion is cursory, with no substantive analysis, and reduces the issues to a binary question of determining the statutory definition (which is legal and reviewed *de novo*), *see* Pet. App. 8a ("Establishing the definition of non-statutory insider status is likewise a purely legal inquiry."), and deciding whether the creditor qualifies under that definition (which is factual and reviewed for clear error), *see id.* ("Whether a specific person qualifies as a non-statutory insider is a question of fact."). The Panel majority says nothing about which standard would be applied if the issue was a mixed question of law and fact.

• Rabkin's refusal to sell his claim for twice as much as provided under the Plan. J.A. 117, 121. (Elsewhere, the Bankruptcy Court did address this fact, but only in the context of determining that no bad faith had occurred. Pet. App. 67a.)

Instead, in response to Judge Clifton's dissenting view that the issue is either legal or a mixed question of law and fact, both subject to *de novo* review, the Panel majority merely refers back to the same conclusory statement above:

> The dissent argues that "Rabkin's status [is] a mixed question of law and fact, subject to de novo review." [Pet. App. 24a]. Stating that an issue is a "mixed question" is simply the dissent's backdoor to reassessing the facts. As stated in Section II, we have two distinct issues in question, each with a different standard of review. First, we reviewed de novo the bankruptcy court's definition of non-statutory insider status, which is a purely legal question. Now, we must analyze whether the facts of this case are such that Rabkin met that definition, which is a purely factual inquiry and properly left to clear error review.

Pet. App. 15a n.13. This circular, self-referential explanation adds nothing to the conclusory discussion above.

The dissenting opinion, by contrast, provides a lengthy discussion of why the issues at a minimum are mixed questions of law and fact. As it sums up the issue:

> [T]he problem here is not with the facts as found by the bankruptcy court but with the legal test that the bankruptcy court applied. What standard did the bankruptcy court apply to determine whether this transaction was conducted at arm's length, by parties acting like they were strangers? We don't know, because

> the bankruptcy court order never discussed the concept. At a minimum, this makes Rabkin's status a mixed question of law and fact, subject to de novo review.

Pet. App. 24a (citation omitted); *see also id.* at 23a (stating that the Bankruptcy Court's ruling "turns at least as much on the legal standard that defines a non-statutory insider as it does on the facts"). These comments echo the typical circumstances when mixed questions are present: "Legal principles that result in . . . mixed questions on appeal are generally broad, often fluid, sometimes common sense concepts that cannot be 'reduced to a neat set of legal rules.'" EDWARDS, ET AL., *supra*, at 12 (quoting *Ornelas*, 517 U.S. at 695-96). Notably, the dissent points out that the Bankruptcy Court's list of five factors is badly flawed because it does not address whether the transaction was arm's length or whether Rabkin and Bartlett were unrelated or "dealt with each other as strangers," as required under the Ninth Circuit's general standard. Pet. App. 13a-14a n.11. These errors are fundamentally legal in nature.

A majority of the other circuit courts to address the issue (the Third, Seventh, Tenth, and Eleventh Circuits) agree with the dissent that insider status is a mixed question of law and fact. *See In re Longview Aluminum, L.L.C.*, 657 F.3d 507, 509 (7th Cir. 2011) ("The question of insider status is regarded as a mixed question of law and fact."); *Schubert v. Lucent Tech. Inc. (In re Winstar Comm'ns, Inc.)*, 554 F.3d 382, 394-95 (3d Cir. 2009) (concluding that insider status "is best characterized as a mixed question of law and fact" requiring "'plenary review of the lower court's interpretation and application of those facts to legal precepts'") (citation omitted); *Anstine v. Carl Zeiss Meditec AG (In re U.S. Med., Inc.)*, 531 F.3d 1272,

1275 (10th Cir. 2008) ("we have a mixed question of law and fact where the legal analysis predominates"); *Miami Police Relief & Pension Fund v. Tabas (In re Florida Fund of Coral Gables, Ltd.)*, 144 Fed. Appx. 72, 74 (11th Cir. 2005) (unpublished) (agreeing that "'[t]he question . . . whether the historical facts found by the bankruptcy court meet the [Bankruptcy] Code's open-ended definition of an insider . . . is properly characterized as a mixed question of law and fact'") (quoting *In re Krehl*, 86 F.3d 737, 742 (7th Cir. 1996)). The Fourth and Fifth Circuits have applied a clearly erroneous standard of review, treating the issue as purely one of fact, though their precedential import is subject to debate. *See Fabricators, Inc. v. Tech. Fabricators, Inc. (In re Fabricators, Inc.)*, 926 F.2d 1458, 1466 (5th Cir. 1991); *Koch v. Rogers (In re Broumas)*, 135 F.3d 769 (table), 1998 WL 77842, at *8 (4th Cir. Feb. 24, 1998) (unpublished); *but see Browning Interests v. Allison (In re Holloway)*, 955 F.2d 1008, 1014 (5th Cir. 1992) (stating, in the closely related context of a state-law fraudulent transfer claim, that "it would appear to us that once the underlying facts are resolved, insider status ultimately is [a] question of law," but not deciding the issue).[5]

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5. The circuit split on the standard of review does not turn on the particular substantive standard regarding insider status applied by the respective courts. If anything, the substantive standards used in the two circuit cases applying deferential review are *more* amorphous and rudderless as legal tests than the Ninth Circuit's standard. *See Fabricators*, 926 F.2d at 1465 ("control is a sufficient basis for insider status; a formal relationship, *e.g.*, officer, director or shareholder, may be persuasive but is not a necessary factor"); *Broumas*, 1998 WL 77842, at *7 ("an insider may be any person or entity whose relationship with the debtor is sufficiently close so as to subject the relationship to careful scrutiny") (internal quotation marks and citations omitted).

Because the Bankruptcy Court established its own test for deciding non-statutory insider status, based upon its review of other cases, the decision is fundamentally legal in nature. *See* EDWARDS, ET AL., *supra*, at 7 ("Laws . . . are the governing principles pursuant to which a judge or jury determines the relevance and significance of historical facts, resolves subsidiary issues, and reaches the ultimate judgment in a case."). The Bankruptcy Court's decision has clear earmarks of a legal ruling: it establishes norms that subsequent decisions may use and apply, and it does so in order to construe an open-ended statute. The bedrock rule that questions of law are reviewed *de novo* is not in dispute. *See Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991) ("Independent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration."); Pet. App. 8a.

The majority of circuit courts that deem non-statutory insider status to be a mixed question apply *de novo* review, recognizing that the issue is significantly legal in nature in light of the large gap between the vague statutory definition and the actual analysis that a bankruptcy court must apply to decide insider status. *See Winstar*, 554 F.3d at 395 (explaining that mixed questions arise where "the facts are undisputed and the issue revolves around the legal conclusion drawn from the facts against the backdrop of a statute" and thus "exercis[ing] plenary review of the lower court's interpretation and application of those facts to legal precepts") (internal quotation marks and citation omitted); *U.S. Med.*, 531 F.3d at 1275 ("Here, however, the facts are undisputed and the issue revolves around the legal conclusion drawn from the facts against the backdrop of a statute; thus, we have a mixed question of law and fact where the legal analysis predominates."); *accord Longview*, 657 F.3d at 509; *Florida Fund*, 144 Fed. Appx.

at 74; *cf. Holloway*, 955 F.2d at 1010 (reversing district court's denial of insider status under Texas fraudulent transfer statute).

This predominant historical pattern among the courts of appeals is significant. *See McLane Co. v. E.E.O.C.*, — U.S. —, 137 S. Ct. 1159, 1166-68 (2017) (holding that "the longstanding practice of the courts of appeals" regarding an appellate standard of review question, *i.e.*, "the 'long history of appellate practice' here . . . carries significant persuasive weight") (quoting *Pierce v. Underwood*, 487 U.S. 552, 558 (1988)). As discussed below, these majority holdings reflect this Court's many precedents regarding the standard of review for mixed questions. Where the issue under review has a significant legal complexion or has potential broader impact than the individual case at hand, *de novo* review is required to ensure consistency of decision, uniformity of legal standards, and sound policy.

II. Mixed Questions Such As Determinations of Insider Status Should Be Reviewed *De Novo* Because They Involve Much More Than a "Neat Comparison of Fact to Law."

A. Questions Applying a Particular Standard, Establishing Norms, Determining Broadly Applicable Policy, or Deciding Ultimate Issues, Are Legal in Nature and Thus Require *De Novo* Review.

If a determination of insider status required nothing more than a "neat comparison of fact to law," EDWARDS, ET AL., *supra*, at 8, the clearly erroneous standard would, and should, apply, because such factual determinations are best made by the factfinder. But the statute and

the tests developed by the appellate courts ask the bankruptcy courts to do much more than that. Due to the statute's ambiguity and the appellate court's very general standard, bankruptcy courts are left to develop their own tests for determining what factors render a relationship comparably close to the enumerated examples in the statute, and whether the transaction was arm's length. These questions are answered not by the facts of the individual case but by reference to the objectives and examples in the statute; in other words, a legal analysis that can be applied to multiple disputes "and not simply to the one *sub judice*." Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 993 n.3 (1986). In no measure can they be reduced to a "neat comparison of fact to law."

The problem is illustrated perfectly by the events in this case. In its decision, the Bankruptcy Court identified the five factors that it believed to be material, based on its asserted review of unidentified cases. These factors were faulty and incomplete on their face (*e.g.*, dismissing a romantic relationship without explanation, and never addressing whether, or why, the transaction was deemed to be arm's length), yet the Ninth Circuit gave U.S. Bank no recourse for meaningful appellate review. If a clearly erroneous standard applies, bankruptcy courts would have plenary authority to develop their own unique legal tests, which would eventually result in inconsistent outcomes as to a legal status that should be consistently recognized from one courtroom to the next.

Neither the Ninth Circuit's Panel majority nor the two other circuit court decisions applying deferential review explain why the question of insider status is purely factual and reviewed for clear error only. They simply assume, almost reflexively, that the issue is factual and thus warrants deferential review for clear error as a matter of course. *See* Pet. App. 8a, 15a n.13; *Fabricators*, 926 F.2d at 1466; *Broumas*, 1998 WL 77842, at *8. This conclusory approach provides no guidance. The decisions certainly do not address the question presented here, whether insider status should be reviewed deferentially on appeal for clear error even though it presents a mixed question of law and fact. And they make absolutely no effort to ground their decision in any of this Court's precedents addressing the appropriate standard of review for statutory questions like insider status. Those precedents make clear that, where the predominant inquiry is legal and not factual (such as determining whether the trial court applied the correct legal standard, as is the case here); or where the trial court is required to develop its own quasi-legal norms to fill gaps in a vague statute (also the case here); or where consistency of decision-making or the need for appellate oversight is an important objective (definitely the case here); or even where the court is resolving the ultimate issue in the case (as here), *de novo* appellate review is required.

This Court has developed multiple tests for deciding the standard of review for mixed questions of law and fact. Applying these tests here leads to only one conclusion: appellate courts should review decisions determining non-statutory insider status *de novo*.

1. The Predominance of Law or Fact Test.

Though this Court has repeatedly acknowledged the difficulty in crafting a single test for deciding standard of review questions, it has never doubted that mixed questions that are predominantly legal in nature should be reviewed *de novo*, as if they were pure issues of law, and those that are predominantly factual are reviewed for clear error. *Compare Miller v. Fenton*, 474 U.S. 104, 114 (1985) (explaining that where the "relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law"), *with Comm'r v. Duberstein*, 363 U.S. 278, 289 (1960) (pointing to the "nontechnical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each" to warrant deferential review). The question often devolves to a simple matter of determining whether the legal question "is analytically more akin to a fact or a legal conclusion." *Miller*, 474 U.S. at 116. As summarized by an oft-quoted Ninth Circuit en banc decision:

> If application of the rule of law to the facts requires an inquiry that is "essentially factual"—one that is founded "on the application of the fact-finding tribunal's experience with the mainsprings of human conduct"—the concerns of judicial administration will favor the district court, and the district court's determination

> should be classified as one of fact reviewable under the clearly erroneous standard. If, on the other hand, the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo.

United States v. McConney, 728 F.2d 1195, 1202 (9th Cir. 1984) (en banc) (quoting *Pullman-Standard*, 456 U.S. at 288; *Duberstein*, 363 U.S. at 289), *abrogation on other grounds recognized in Estate of Merchant v. Comm'r*, 947 F.2d 1390 (9th Cir. 1991); *see also Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 n.17 (1984) ("At some point, the reasoning by which a fact is 'found' crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment."); Monaghan, *supra*, at 233 (describing law and fact distinctions as "having a nodal quality; they are points of rest and relative stability on a continuum of experience").

Matters falling closer to the middle of the spectrum more often than not are reviewed *de novo*. *See, e.g.*, *Pullman-Standard*, 456 U.S. at 289 n.19 ("there is also support in decisions of this Court for the proposition that conclusions on mixed questions of law and fact are independently reviewable by an appellate court"); *United States v. Brown*, 631 F.3d 638, 643 (3d Cir. 2011) ("This [law-fact] calculus will generally favor de novo

review, 'because usually the application of law to fact will require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles.'") (quoting *McConney*, 728 F.2d at 1202). Thus, where the statutory standard is not well-developed, and further legal extrapolation by the trial court is required to be able to apply the statute to the facts, *de novo* review typically is required.

Similarly, an appeal like this one that raises the question of whether the trial court "applied the proper standard to essentially undisputed facts" is considered predominantly legal and subject to *de novo* review. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960). In *Parke, Davis*, this Court rejected an argument that a district court's error in refusing to consider non-contractual sources of illegal combinations in violation of the Sherman Act was reviewable only for clear error because the error went to the standard applied by the court in deciding how to weigh the facts, which was incorrect in light of recent Supreme Court precedent. *See id.* at 44-46 (citing six prior decisions of this Court reviewing such issues as questions of law); *accord United States v. Gen. Motors Corp.*, 384 U.S. 127, 141-43 & n.16 (1966) ("As in *Parke Davis*, *supra*, the question here is not one of 'fact,' but consists rather of the legal standard required to be applied to the undisputed facts of this case"); *cf. Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491 (1937) (applying *de novo* review to determination of ultimate fact based on historical and circumstantial facts); *Bogardus v. Comm'r*, 302 U.S. 34, 38-39 (1937) (same).

Perhaps the best example of this Court's requirement of *de novo* review for decisions by trial courts that are

necessarily normative—*i.e.*, they require the court to develop and apply either explicit or implicit norms to fill a large gap between a vague legal standard and historical facts—arises in questions involving a legal status. Where trial courts must determine the norms that govern whether a party satisfies a particular legal status, such a question is primarily legal in nature and requires *de novo* review. *See, e.g., Miller*, 474 U.S. at 116 (concluding that the fact that the inquiry "subsum[es], as it does, a 'complex of values' . . . itself militates against treating the question as one of simple historical fact") (internal citation omitted).

A series of maritime cases illustrate this principle. This Court has repeatedly held that, determining whether a plaintiff is a "member of a crew" and thus a "seaman" under the Jones Act (which does not specifically define these terms) is a mixed question of law and fact, whereby it is for the courts "to define the statutory standard" as "[m]ember of a crew' and 'seaman' are statutory terms; their interpretation is a question of law." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991). Only when the standard is fully developed by the courts do the factual aspects of whether the party is a member of a crew and thus a seaman become issues of fact. *See id.* This Court therefore held that, even though the jury decides the question of whether the plaintiff was a seaman, the trial court must decide, as a matter of law, whether the term "seaman" applied to employment connected with a vessel in navigation. *Id.* at 355. By contrast, where issues of fact remained open after the legal standard had been resolved, the issue is not decided as a matter of law. *See Sw. Marine, Inc. v. Gizoni*, 502 U.S. 81, 87-88 (1991); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 712-14 (1986) (distinguishing between ultimate fact and legal standard

regarding Jones Act definition, which is decided *de novo*, and historical facts about "how the respondents spent their time working on board," which is challenged for clear error). Several years later, this Court addressed the issue again as a matter of law and distinguished between land-based and sea-based maritime workers, requiring the latter to have a substantial connection with a vessel in navigation, so that stevedores subject to the Longshore and Harbor Workers' Compensation Act could not be considered seamen under the Jones Act. *See Chandris*, 515 U.S. at 355-72.

The parallels between the statutory schemes in "seaman" cases and the "insider" provisions of the Bankruptcy Code are clear. Both schemes involve a key legal status that determines important rights under their respective statutes. In both cases, the statutory categorization is not defined in the statute. And, in both cases, the lack of specificity has required multiple iterations of judicial clarification and standard-making. If anything, the circumstances here lean more to the "law" side of the equation as the circuit courts have compounded the problem by setting forth extremely generalized standards (*i.e.*, "control," "arm's length transaction," "close relationship") that leave to bankruptcy courts the task of making the type of value judgments about the concept of an "insider" that should *not* be decided on a case-by-case basis. This Court, therefore, should follow the same bright-line approach that it used in the maritime cases, where it deemed all issues relating to the standards for determining who is a "seaman," *i.e.*, anything constituting a norm, to be treated as predominantly legal and thus reviewed *de novo*, and treating the remaining historical fact questions as factual and reviewed deferentially. The

maritime precedents are highly relevant to the analysis here, and, perhaps more importantly, their bright-line approach appears to have worked.

2. The Historical Test.

The next test applied by this Court is a historical analysis. This Court recently affirmed that, if the statute itself does not provide a clear answer, the next step of inquiry "ask[s] whether the 'history of appellate practice' yields an answer." *McLane*, 137 S. Ct. at 1166 (quoting *Underwood*, 487 U.S. at 558). As discussed above, "the longstanding practice of the courts of appeals in reviewing" determinations of insider status, *id.*, is to apply a searching, *de novo* standard of review. This majority rule adheres to the more general practice in bankruptcy appeals to apply *de novo* review of bankruptcy court interpretations of undefined legal categorizations in the Bankruptcy Code, treating them as matters of statutory interpretation.

For example, in *First Nat'l Bank of Durango v. Woods (In re Woods)*, 743 F.3d 689 (10th Cir. 2014), the Tenth Circuit had to decide the appropriate standard for review of a bankruptcy court's evaluation of factors in determining whether a debt for a principal residence had "arise[n] out of" a "farming operation," both of which were undefined terms in the Bankruptcy Code. The bankruptcy court had not adopted any specific legal test and instead concluded as a factual matter that the debt arose from a farming operation that satisfied the statute. That ruling was reversed by the Tenth Circuit in reasoning that is apposite here. The Tenth Circuit found that, "[a]lthough it is true that the bankruptcy court did not explicitly identify

the legal test it applied in reaching its conclusion, the court necessarily must have determined that the facts on which it relied were legally sufficient to meet the statute's requirements." *Id.* at 693 n.1. *De novo* review therefore was required, as the analysis essentially constituted a legal question of statutory interpretation even though the bankruptcy court had treated it as an issue of fact. *Id.* at 693. This case presents essentially the same question regarding the standard of review as *Woods*, and it is far from an anomaly. A number of circuits, including the Ninth Circuit, have had a longstanding practice of applying *de novo* review for appeals challenging the lower courts' determinations of how to weigh or to apply significance to some categories of evidence over others. *See, e.g., In re Bammer*, 131 F.3d 788, 792 (9th Cir. 1997) ("Mixed questions presumptively are reviewed by us de novo because they require consideration of legal concepts and the exercise of judgment about the values that animate legal principles.").[6]

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6. *See also Indmar Prods., Inc. v. Comm'r*, 444 F.3d 771, 774 (6th Cir. 2006) ("'Whether the [lower] court failed to consider or accord proper weight or significance to relevant evidence are questions of law we review *de novo*'") (quoting *Flying J, Inc. v. Comdata Network, Inc.*, 405 F.3d 821, 829 (10th Cir. 2005)) (in turn quoting *Harvey ex rel. Lankenbaker v. United Transp. Union*, 876 F.2d, 1235, 1244 (10th Cir. 1989)); *Schlumberger Res. Mgmt. Servs., Inc. v. CellNet Data Sys., Inc.* (*In re CellNet Data Sys., Inc.*), 327 F.3d 242, 244 (3d Cir. 2003) (applying a "mixed standard" for reviewing "mixed questions of law and fact," by "affording a clearly erroneous standard to integral facts, but exercising plenary review of the lower court's interpretation and application of those facts to legal precepts"); *New Era Publ'ns Int'l, ApS v. Carol Pub. Grp.*, 904 F.2d 152 (2d Cir. 1990) (holding that "fair use" in copyright law "is a mixed question of law and fact . . . and thus the district court's conclusion on this point is open to full review on appeal");

Indeed, in many other bankruptcy contexts, the consensus rule calls for *de novo* review. This is particularly true where the bankruptcy court is given wide birth to examine a range of issues when applying undefined statutory terms. For instance, the circuit courts review *de novo* a bankruptcy court's determination of "undue burden" or "hardship" for discharging of an educational loan pursuant to section 523(a)(8) of the Bankruptcy Code. *See, e.g., Educ. Credit Mgmt. Corp. v. Jesperson*, 571 F.3d 775, 779 (8th Cir. 2009) ("[r]eviewing courts must consider the debtor's past, present, and reasonably reliable future financial resources, the debtor's reasonable and necessary living expenses, and 'any other relevant facts and circumstances'" because undue hardship "is a question of law, which we review de novo" except for subsidiary factual issues).[7] So, too, are determinations

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Panduit Corp. v. Dennison Mfg. Co., 810 F.2d 1561, 1566 (Fed. Cir. 1987) (holding that patent obviousness is a mixed issue of law and fact that should be reviewed *de novo* for its ultimate, quasi-legal conclusion, while allowing clear error review of underlying facts); *Piedmont Minerals Co. v. United States*, 429 F.2d 560, 562 n.4 (4th Cir. 1970) ("The characterization of the ultimate issue as one of fact, and the resulting diminution of the scope of review, does not, of course, affect the requirement that the legally relevant factors be applied in making the determination.").

7. *See also, e.g., Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1305 (10th Cir. 2004) (holding that undue hardship "requires a conclusion regarding the legal effect of the bankruptcy court's findings as to the debtor's circumstances, and is therefore reviewed de novo"); *Tenn. Student Assistance Program v. Hornsby (In re Hornsby)*, 144 F.3d 433, 438 (6th Cir. 1998) (applying *de novo* review to reverse undue hardship ruling that did "not engage in the meaningful inquiry required to evaluate" the facts. As the Eighth Circuit states, "[a]ll other circuit courts, who have addressed this issue, have concluded that an 'undue hardship' determination is a

of whether nondischargeability of student loans would be unconscionable.[8]

The Panel majority's departure from the Ninth Circuit's own historical approach to deciding this type of question (as demonstrated by *Bammer, supra*) corroborates that its deference is an outlier and not in accord with historical practice. Notably, the circuit courts' longstanding practice of applying *de novo* review to these types of questions has not resulted in any wide condemnation in the academic literature of judicial overreaching, nor any complaints in the judicial or bankruptcy communities of negative consequences.[9]

It is equally telling that the decisions applying the minority rule do so with essentially no analysis or explanation supporting the conclusion that the issue is solely factual. One of the decisions, the Fifth Circuit's 1991 decision in *Fabricators*, is itself at considerable odds with

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question of law, which requires a de novo review." *Long v. Educ. Credit Mgmt. Corp. (In re Long)*, 322 F.3d 549, 553 (8th Cir. 2003).

8. *See, e.g., DHHS v. Smitley*, 347 F.3d 109, 115-16 (4th Cir. 2003) (holding that definition of "unconscionable" is a legal question, and that "application of the unconscionability standard to the facts of this case constitutes a mixed question of law and fact, requiring 'a conclusion regarding the legal effect of the Bankruptcy Court's findings as to [the debtor's] circumstances[,]'" which is reviewed *de novo*).

9. In this regard, the Seventh Circuit's longstanding of *de novo* review of non-statutory insider rulings is especially noteworthy: the Seventh Circuit typically reviews mixed questions for clear error. *Compare Longview*, 657 F.3d at 509, and *Krehl*, 86 F.3d at 742, *with Thomas v. Gen. Motors Acceptance Corp.*, 288 F.3d 305, 307-08 (7th Cir. 2003).

extensive dicta and discussion in another Fifth Circuit decision, *Holloway*, issued just one year later. *Compare Fabricators*, 926 F.2d at 1466, *with Holloway*, 955 F.2d at 1014. The only other circuit to agree with the Panel majority, the Fourth, did so in a similarly cursory, non-precedential unpublished opinion. *See Broumas*, 1998 WL 77842, at *8. The "historical test" requires more than just a mechanical "head-counting exercise" of identifying the majority and minority rules, *McLane*, 137 S. Ct. at 1167, so the quality of the decisions counts. Here, the minority-rule cases are sorely lacking.

For these reasons, the historical test supports *de novo* review.

3. The Functional Analysis Test.

"Where history and precedent provide no clear answers, functional considerations also play their part" in distinguishing legal considerations from factual ones. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 388 (1996). The functional analysis assesses whether, "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Miller*, 474 U.S. at 114. Thus, as *McLane* explains, "at least where 'neither a clear statutory prescription nor a historical tradition exists,' we ask whether, 'as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.'" 137 S. Ct. at 1166-67 (quoting *Underwood*, 487 U.S. at 558, 558-60 (in turn quoting *Miller*, 474 U.S. at 114) (internal quotation marks omitted)). Under this test, the open-ended statutory definition of "insider" in the Bankruptcy Code, the serious

legal consequences that adhere to the determination of insider status, and the relative lack of factual disputes or credibility issues, all make the question perfectly suited for appellate decision-making.

For similar reasons, the issue should not be relegated to the individual fact-finding discretion of trial judges, as that inevitably leads to disparate standards governing a critical legal status under the Bankruptcy Code. Put simply, is the question of whether someone is an insider under the Bankruptcy Code such a case-specific, factually nuanced determination that it is better policy to defer to the judgment of the individual judge, even if virtually identical fact situations could result in contradictory outcomes depending upon the particular views, values, and even caprice of the deciding judge? That outcome is untenable—insider status is a *legal* status and thus should have consistent application—yet that is the likely result of the Panel majority's decision. For numerous reasons, therefore, appellate courts must have authority to shape this type of decision.

From an institutional perspective, appellate courts are much better situated to decide norms and standards that give meaning and limits for open-ended statutory terms. *See Salve*, 499 U.S. at 232 ("[c]ourts of appeal . . . are structurally suited to the collaborative juridical process that promotes decisional accuracy"). In cases where the applicable legal principles established to date "are not 'finely-tuned standards,'" but "are instead fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed," *Ornelas*, 517 U.S. at 696, the deciding court must determine and graft its own determination of the key considerations

onto the facts—a quasi-legal determination. In such cases, where the "relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law." *Miller*, 474 U.S. at 114 (citing *Bose*, 466 U.S. at 503).

This Court, thus, has held in the Fourth Amendment context that, because "the legal rules for probable cause and reasonable suspicion acquire content only through application[,] [i]ndependent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles." *Ornelas*, 517 U.S. at 697. The same logic applies for determinations of whether a confession is voluntary. *See Miller*, 474 U.S. at 115-16. Only when the legal principles are fully established and fleshed-out by precedent should the determination be considered factual and better decided by a trial judge.

As discussed above, the norms for deciding non-statutory insider status are not established. Basic questions regarding which factors are relevant and how they should be weighed remain open, and the inquiry itself is still largely open-ended. These questions are quintessential appellate issues.

A second consideration looks to the effect of the determination. This factor considers whether consistency of decisions and the need for uniform standards is more important than deferring to the judicial discretion of trial courts as to how to the weigh the evidence. For example, if the question is *sui generis*, then judicial discretion is

desirable and appropriate. *See Duberstein*, 363 U.S. at 289 (explaining that deferential review recognizes "the fact-finding tribunal's experience with the mainsprings of human conduct"). But where it is important to prevent affirmance of opposite decisions on identical facts from different judicial districts in the same circuit, as might result under deferential review, this Court prefers to "allow appellate courts to clarify the legal principles" through *de novo* review. *United States v. Arvizu*, 534 U.S. 266, 275 (2002) (discussing *Ornelas*, 517 U.S. at 697); *see also Salve*, 499 U.S. at 231 ("Independent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration."). If unifying precedent and providing greater guidance to affected parties as to the consequences of their actions are important considerations, then the appellate courts should be vested with law-clarifying authority.

This consideration favors *de novo* review here as well. The need for uniformity of standards is high: a legal status is involved, and the determination of such status will affect many areas of bankruptcy law. *See* 11 U.S.C. §§ 503(c) (limiting insider compensation); 547(b)(4)(B) (extended preference period for insider transfers); 544, 548, and 550 (provisions affecting fraudulent transfers to insiders); 702(a)(3) (excluding insider voting for chapter 7 trustees); 727(a)(7) (establishing insider conduct as basis to deny discharge); 747(1) (subordinating insider claims to other customer claims); 1129(a)(5)(B) (requiring disclosure of insider retention); and 1129(a)(10) (prohibition against insider voting). No policy justifies a judicial process under which someone might be considered an insider in one courtroom and a stranger to the transaction in another courtroom when the facts regarding their relationship

to the debtor and the transaction at issue are largely analogous. Savvy counsel would readily understand this as an open invitation for forum-shopping.

Bankruptcy law in particular should not devolve into splintered standards. The Constitution itself provides that the congressional power to enact bankruptcy laws is intended to promote "uniform laws . . . throughout the United States." U.S. CONST. art. I, § 8, c.4. Consistency of decisions and uniform standards and norms are especially important for the question of insider status to ensure adherence to the Bankruptcy Code's fundamental principle that similarly-situated creditors are treated alike and that debtors cannot use their relationships with insiders to disadvantage other creditors. The participants need clear standards and "a defined set of rules which, in most instances, makes it possible [for them] to reach a correct determination *beforehand* as to whether" their contemplated transaction will have negative legal consequences. *Ornelas*, 517 U.S. at 697 (emphasis added, internal quotation marks and citation omitted). In deciding that issue, key questions such as whether a romantic involvement between the debtor and creditor may even be treated as a material issue should not depend upon the values of a particular judge. This high need for uniformity and development of precedential authority to guide factual analysis strongly favors *de novo* review.

A third functional consideration involves the mechanics of the decision. If it rests largely on weighing the credibility of witnesses and resolving historical fact disputes, then deferential review might be appropriate. "[O]nly deferential review [gives] the district court the necessary flexibility to resolve questions involving

'multifarious, fleeting, special, narrow facts that utterly resist generalization.'" *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 404 (1990) (quoting *Pierce*, 487 U.S. at 561-62). Where the outcome rests on questions like witness credibility, the "superiority of the trial judge's position to make determinations of credibility" provides a pivotal "rationale for deference." *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). But the converse also is true. In cases where judicial resolution of historical facts does not play a leading role in the decision, and the facts instead are largely undisputed or clear from a paper record, deference is not warranted. *See, e.g., Gen. Motors*, 384 U.S. at 141 n.16 ("Moreover, the trial court's customary opportunity to evaluate the demeanor and thus the credibility of the witnesses, which is the rationale behind Rule 52 (a), plays only a restricted role here. This was essentially a 'paper case.' It did not unfold by the testimony of 'live' witnesses.") (internal citation omitted). Little is gained by deferring to trial court decisions that are based on the same considerations that the appellate court is able to make.

Nothing in the particular nature of "insider status" requires a hands-on, in-person assessment of the evidence. Unlike determinations of bad faith, insider status does not depend on individualized subjective factors, such as scienter. In the proceedings below, none of the key historical facts was in dispute, and, thus, the Bankruptcy Court's fact-finding function was not implicated. Where the Bankruptcy Court did exercise noteworthy discretion, ironically enough, was its selection of five factors identifying non-statutory insiders based upon its canvass of other cases and its concomitant failure to consider other factors, especially factors relating to whether the

transaction was arm's-length. Pet. App. 66a; J.A. 153-54. This analysis was quintessentially legal in nature, not factual. Close case-reading is precisely the type of legal function that falls squarely in the purview of three-judge appellate panels. *See Miller*, 474 U.S. at 114 (explaining why three-judge panels are better than one judge to resolve legal questions).

For these reasons, appellate courts are well-positioned to have ultimate say in deciding whether a person or entity should be treated as a non-statutory insider under the Bankruptcy Code. From a functional perspective, *de novo* review is both appropriate and warranted.

4. The "Ultimate Issue" Test.

This Court has used a fourth test that considers whether the issue is dispositive of the broader question under consideration, *i.e.*, whether it is an "ultimate issue" that "'clearly impl[ies] the application of standards of law.'" *Pullman-Standard*, 456 U.S. at 286 n.16 (quoting *Baumgartner v. United States*, 322 U.S. 665, 671 (1944)); *see also id.* ("[t]his Court has on occasion itself indicated that findings on 'ultimate facts' are independently reviewable."). Ultimate issues are hybrids that pose the same issues as other mixed questions. *See* Louis, *supra*, at 994 ("Ultimate facts, because they combine elements of fact and law, do not fit nicely within the fact/law dichotomy."). As with mixed questions in general, where legal issues are implicated in ultimate decisions, *de novo* review is warranted. *See, e.g., Williams v. Mehra*, 186 F.3d 685, 689 (6th Cir. 1999) (en banc) ("Lower court findings of ultimate facts based upon the application of legal principles to subsidiary facts are subject to *de novo*

review."). But where no such legal dimension is implicated, deferential review may be used. *See Teva Pharms. USA, Inc. v. Sandoz, Inc.*, — U.S. —, 135 S. Ct. 831, 837 (2015).

Insider status unquestionably was the ultimate issue decided by the Bankruptcy Court. Because, for the reasons previously discussed, that decision requires the application of law to resolve that ultimate question, it should be reviewed *de novo*.

B. All of the Applicable Tests and Considerations for Resolving the Standard of Review for Mixed Questions of Law and Fact Support *De Novo* Review of Non-Statutory Insider Determinations.

The above principles lead to one conclusion: *de novo* review is required. Because the open-ended nature of the statutory definition of insider, coupled with the open-ended nature of the Ninth Circuit's standard (close relationship and no arm's length transaction), compels bankruptcy courts to fend for themselves and develop the norms and criteria they deem most appropriate and applicable, the decision is inherently legal or quasi-legal in nature. As those decisions accumulate, they will increasingly sow chaos due to the lack of clear rules educating the parties beforehand which transactions they can and cannot enter and invite forum-shopping. *De novo* review is already the historically predominant standard. Perhaps most important of all, deciding the pertinent factors for determining who is an insider under the Bankruptcy Code falls within the clear province of appellate courts. Conceptually, historically, functionally, and pragmatically, the appellate courts should have the ultimate say on this determination.

These interests are especially apt here. As affirmed by the Panel majority, the Bankruptcy Court's narrow interpretation of the statute to limit non-statutory insider analysis to questions of control, cohabitation, payment of expenses, and the purchase of expensive gifts, while ignoring whether the transaction was at arm's length, will make it more difficult to establish insider status. Moreover, the key facts ignored by the Bankruptcy Court (and thus ignored by the Panel majority due to its deference to the Bankruptcy Court) were undisputed, and thus were fully appropriate for *de novo* appellate review; their impact may be assessed by three appellate judges just as readily as by the trial judge. Appellate courts do this on a daily basis when they consider summary judgment records or motions for judgment as a matter of law. As Judge Clifton's dissent notes, the Bankruptcy Court's refusal to consider facts bearing on the lack of an arm's length transaction including Rabkin and Bartlett's close romantic and business relationship, Bartlett's failure to shop the claim to anyone other than Rabkin, and Rabkin's failure to accept an offer to sell his claim for twice as much as provided under the Plan, among other things, renders its decision that Rabkin is not an insider absurd on its face. *See* Pet. App. 24a-25a. Right or wrong, this is a policy question and a matter of statutory interpretation—*i.e.*, a core appellate-court function. Bankruptcy courts cannot be the sole arbiters of such a clear legal determination—one that the Panel majority itself might not have made had it applied *de novo* review. *See* Pet. App. 17a, 18a n.14, 20a, 24a.

At bottom, the Bankruptcy Court's narrow treatment of non-statutory insiders alters the statute's scope and conflicts with congressional intent that the lack of an arm's

length transaction constitutes the measure against which insider status should be assessed. *See* S. REP. No. 95-989, at 25 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5810 ("An insider is one who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at [arm's] length with the debtor."). Rewriting that principle to limit the statutory definition to only those individuals deemed to constitute the functional equivalents of statutory insiders, such that the question of whether the transaction was arm's length is immaterial, cries out for *de novo* appellate review.

Insider status is itself a critical distinction under the law. This Court long ago recognized in the context of claims objections under the Bankruptcy Act that transactions between insiders and their corporation must be "subjected to rigorous scrutiny." *Pepper v. Litton*, 308 U.S. 295, 306 (1939). Similarly, because the "danger inherent in any reorganization plan proposed by a debtor . . . [is] that the plan will simply turn out to be too good a deal for the debtor's owners" at the expense of disfavored creditors, the absolute priority rule protects against "the ability of a few insiders . . . to use the reorganization process to gain an unfair advantage." *Bank of Am. Trust & Savings Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 444 (1999) (internal citations omitted). The same holds true in other areas of the law—securities, corporations, and commercial transactions, to name a few. In light of the broad significance of a judicial determination of insider status, and the "rigorous scrutiny" courts must apply following such a determination, simple logic holds that a similar level of rigor should be applied when an appellate court reviews the determination of insider status.

But this is especially true for bankruptcy cases. Insider status is critically important in numerous areas of bankruptcy law. Not only does it affect plan confirmation fights, as in this case, but preferential and fraudulent transfer avoidance claims under sections 544, 547, 548, and 550 of the Bankruptcy Code, objections to discharge under section 727 of the Bankruptcy Code, equitable subordination, and even insider transactions subject to the Uniform Fraudulent Transfer Act and the Uniform Voidable Transaction Acts, sections 4(b) and 5(b), frequently turn on whether a creditor or transferee is an insider. Uniformity of decision as to who is and is not an insider therefore requires a clear rule for effective implementation of the Bankruptcy Code. Conversely, a wide disparity of rulings as to who is an insider and who is not does not benefit anyone, yet that would be the inevitable result if bankruptcy courts are allowed to develop their own standards with virtually no appellate oversight.

Appellate courts can readily decide insider issues. Their job is to create tests and identify material factors, weigh the factors, and apply them to the underlying facts, so requiring them to do it here is fully consistent with their historical practice. Multiple circuits have been doing it for years in this area without any reported ill effects.

If, on the other hand, statutory questions regarding a purely objective question of a legal status are relegated to the broad control of trial courts without meaningful appellate review, consistency and uniformity of open-ended statutory terms would be at risk. As disparate tests emerge, individuals would not know how to govern themselves. Moreover, because courts would have to

apply similar broad deference for open-ended terms like "investor" and "undue hardship," requiring deferential review here could result in a substantial ripple effect in numerous statutory areas, all without any clear policy benefit.

The majority rule of *de novo* review for mixed questions of law and fact thus reflects the sensible and proper approach to ensuring that insiders who have a material advantage over other creditors are not allowed to benefit from that advantage under the Bankruptcy Code. *De novo* review is required to enforce the Code's principles of fairness and equity.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed and the case remanded for *de novo* review of the Bankruptcy Court's decision.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 8, cl. 4

The Congress shall have Power . . . To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.

11 U.S.C. § 101(9)

§ 101. Definitions

In this title the following definitions shall apply:

***

(9) The term "corporation"--

(A) includes--

(i) association having a power or privilege that a private corporation, but not an individual or a partnership, possesses;

(ii) partnership association organized under a law that makes only the capital subscribed responsible for the debts of such association;

(iii) joint-stock company;

(iv) unincorporated company or association; or

(v) business trust; but

(B) does not include limited partnership.

11 U.S.C. § 101(31)

§ 101. Definitions

In this title the following definitions shall apply:

***

(31) The term "insider" includes--

(A) if the debtor is an individual--

(i) relative of the debtor or of a general partner of the debtor;

(ii) partnership in which the debtor is a general partner;

(iii) general partner of the debtor; or

(iv) corporation of which the debtor is a director, officer, or person in control;

(B) if the debtor is a corporation--

(i) director of the debtor;

(ii) officer of the debtor;

(iii) person in control of the debtor;

(iv) partnership in which the debtor is a general partner;

(v) general partner of the debtor; or

(vi) relative of a general partner, director, officer, or person in control of the debtor;

(C) if the debtor is a partnership--

(i) general partner in the debtor;

(ii) relative of a general partner in, general partner of, or person in control of the debtor;

(iii) partnership in which the debtor is a general partner;

(iv) general partner of the debtor; or

(v) person in control of the debtor;

(D) if the debtor is a municipality, elected official of the debtor or relative of an elected official of the debtor;

(E) affiliate, or insider of an affiliate as if such affiliate were the debtor; and

(F) managing agent of the debtor.

11 U.S.C. § 102

§ 102. Rules of construction

In this title--

(1) "after notice and a hearing", or a similar phrase--

(A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but

(B) authorizes an act without an actual hearing if such notice is given properly and if--

(i) such a hearing is not requested timely by a party in interest; or

(ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act;

(2) "claim against the debtor" includes claim against property of the debtor;

(3) "includes" and "including" are not limiting;

(4) "may not" is prohibitive, and not permissive;

(5) "or" is not exclusive;

(6) "order for relief" means entry of an order for relief;

(7) the singular includes the plural;

(8) a definition, contained in a section of this title that refers to another section of this title, does not, for the purpose of such reference, affect the meaning of a term used in such other section; and

(9) "United States trustee" includes a designee of the United States trustee.

11. U.S.C. § 503(c)

§ 503. Allowance of administrative expenses

(c) Notwithstanding subsection (b), there shall neither be allowed, nor paid--

(1) a transfer made to, or an obligation incurred for the benefit of, an insider of the debtor for the purpose of inducing such person to remain with the debtor's business, absent a finding by the court based on evidence in the record that--

(A) the transfer or obligation is essential to retention of the person because the individual has a bona fide job offer from another business at the same or greater rate of compensation;

(B) the services provided by the person are essential to the survival of the business; and

(C) either--

(i) the amount of the transfer made to, or obligation incurred for the benefit of, the person is not greater than an amount equal to 10 times the amount of the mean transfer or obligation of a similar kind given to nonmanagement employees for any purpose during the calendar year

in which the transfer is made or the obligation is incurred; or

(ii) if no such similar transfers were made to, or obligations were incurred for the benefit of, such nonmanagement employees during such calendar year, the amount of the transfer or obligation is not greater than an amount equal to 25 percent of the amount of any similar transfer or obligation made to or incurred for the benefit of such insider for any purpose during the calendar year before the year in which such transfer is made or obligation is incurred;

(2) a severance payment to an insider of the debtor, unless--

(A) the payment is part of a program that is generally applicable to all full-time employees; and

(B) the amount of the payment is not greater than 10 times the amount of the mean severance pay given to nonmanagement employees during the calendar year in which the payment is made; or

(3) other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case, including transfers made to, or obligations incurred for the benefit of, officers, managers, or consultants hired after the date of the filing of the petition.

11 U.S.C. § 544

§ 544. Trustee as lien creditor and as successor to certain creditors and purchasers

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by--

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b)(1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.

11 U.S.C. § 547(b)

§ 547. Preferences

(b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property--

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made--

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if--

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 548(a)

§ 548. Fraudulent transfers and obligations

(a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily--

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or

(IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1) (B) in any case in which--

(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or

(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.

11 U.S.C. § 550(c)

§ 550. Liability of transferee of avoided transfer

(c) If a transfer made between 90 days and one year before the filing of the petition--

(1) is avoided under section 547(b) of this title; and

(2) was made for the benefit of a creditor that at the time of such transfer was an insider;

the trustee may not recover under subsection (a) from a transferee that is not an insider.

11 U.S.C. § 702(a)

§ 702. Election of trustee

(a) A creditor may vote for a candidate for trustee only if such creditor--

(1) holds an allowable, undisputed, fixed, liquidated, unsecured claim of a kind entitled to distribution under section 726(a)(2), 726(a)(3), 726(a)(4), 752(a), 766(h), or 766(i) of this title;

(2) does not have an interest materially adverse, other than an equity interest that is not substantial in relation to such creditor's interest as a creditor, to the interest of creditors entitled to such distribution; and

(3) is not an insider.

11 U.S.C. § 727(a)

§ 727. Discharge

(a) The court shall grant the debtor a discharge, unless--

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed--

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case--

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case--

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within 8 years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of

the filing of the petition, unless payments under the plan in such case totaled at least--

(A) 100 percent of the allowed unsecured claims in such case; or

(B)(i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort;

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter;

(11) after filing the petition, the debtor failed to complete an instructional course concerning personal financial management described in section 111, except that this paragraph shall not apply with respect to a debtor who is a person described in section 109(h)(4) or who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved instructional courses are not adequate to service the additional individuals who would otherwise be required to complete such instructional courses under this section (The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in this paragraph shall review such determination not later than 1 year after the date

of such determination, and not less frequently than annually thereafter.); or

(12) the court after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge finds that there is reasonable cause to believe that--

(A) section 522(q)(1) may be applicable to the debtor; and

(B) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).

11 U.S.C. § 747

§ 747. Subordination of certain customer claims

Except as provided in section 510 of this title, unless all other customer net equity claims have been paid in full, the trustee may not pay in full or pay in part, directly or indirectly, any net equity claim of a customer that was, on the date the transaction giving rise to such claim occurred--

(1) an insider;

(2) a beneficial owner of at least five percent of any class of equity securities of the debtor, other than--

(A) nonconvertible stock having fixed preferential dividend and liquidation rights; or

(B) interests of limited partners in a limited partnership;

(3) a limited partner with a participation of at least five percent in the net assets or net profits of the debtor; or

(4) an entity that, directly or indirectly, through agreement or otherwise, exercised or had the power to exercise control over the management or policies of the debtor.

11 U.S.C. § 1129(a)

§ 1129. Confirmation of plan

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

(5)(A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

(7) With respect to each impaired class of claims or interests--

(A) each holder of a claim or interest of such class--

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interests--

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that--

(A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

(B) with respect to a class of claims of a kind specified in section 507(a)

(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive--

(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;

(C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim regular installment payments in cash--

(i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;

(ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and

(iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)); and

(D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(12) All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

(14) If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.

(15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan--

(A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

(16) All transfers of property under the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

UNIF. FRAUDULENT TRANSFER ACT § 1 (1984)

SECTION 1: DEFINITIONS

As used in this [Act]:

(1) "Affiliate" means:

(i) a person who directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities,

(A) as a fiduciary or agent without sole discretionary power to vote the securities; or

(B) solely to secure a debt, if the person has not exercised the power to vote;

(ii) a corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor or a person who directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities,

(A) as a fiduciary or agent without sole power to vote the securities; or

(B) solely to secure a debt, if the person has not in fact exercised the power to vote;

(iii) a person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor; or

(iv) a person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(2) "Asset" means property of a debtor, but the term does not include:

(i) property to the extent it is encumbered by a valid lien;

(ii) property to the extent it is generally exempt under nonbankruptcy law; or

(iii) an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.

(3) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(4) "Creditor" means a person who has a claim.

(5) "Debt" means liability on a claim.

(6) "Debtor" means a person who is liable on a claim.

(7) "Insider" includes:

(i) if the debtor is an individual,

(A) a relative of the debtor or of a general partner of the debtor;

(B) a partnership in which the debtor is a general partner;

(C) a general partner in a partnership described in clause (B); or

(D) a corporation of which the debtor is a director, officer, or person in control;

(ii) if the debtor is a corporation,

(A) a director of the debtor;

(B) an officer of the debtor;

(C) a person in control of the debtor;

(D) a partnership in which the debtor is a general partner;

(E) a general partner in a partnership described in clause (D); or

(F) a relative of a general partner, director, officer, or person in control of the debtor;

(iii) if the debtor is a partnership,

(A) a general partner in the debtor;

(B) a relative of a general partner in, or a general partner of, or a person in control of the debtor;

(C) another partnership in which the debtor is a general partner;

(D) a general partner in a partnership described in clause (C); or

(E) a person in control of the debtor;

(iv) an affiliate, or an insider of an affiliate as if the affiliate were the debtor; and

(v) a managing agent of the debtor

(8) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable

process or proceedings, a common-law lien, or a statutory lien.

(9) "Person" means an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.

(10) "Property" means anything that may be the subject of ownership.

(11) "Relative" means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.

(12) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

(13) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

UNIF. FRAUDULENT TRANSFER ACT § 4 (1984)

SECTION 4: TRANSFERS FRAUDULENT AS TO PRESENT AND FUTURE CREDITORS.

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction;

or

(ii) intended to incur, or believed or reasonably should have believed that he [or she] would incur, debts beyond his [or her] ability to pay as they became due.

(b) In determining actual intent under subsection (a)

(1), consideration may be given, among other factors, to whether:

(1) the transfer or obligation was to an insider;

(2) the debtor retained possession or control of the property transferred after the transfer;

(3) the transfer or obligation was disclosed or concealed;

(4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) the transfer was of substantially all the debtor's assets;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

UNIF. FRAUDULENT TRANSFER ACT § 5 (1984)

SECTION 5: TRANSFERS FRAUDULENT AS TO PRESENT CREDITORS.

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

UNIF. VOIDABLE TRANSACTIONS ACT § 1 (1984)

SECTION 1: DEFINITIONS.

As used in this [Act]:

(1) "Affiliate" means:

(i) a person that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person that holds the securities:

(A) as a fiduciary or agent without sole discretionary power to vote the securities; or

(B) solely to secure a debt, if the person has not in fact exercised the power to vote;

(ii) a corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor or a person that directly or indirectly owns, controls, or holds, with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person that holds the securities:

(A) as a fiduciary or agent without sole discretionary power to vote the securities; or

(B) solely to secure a debt, if the person has not in fact exercised the power to vote;

(iii) a person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor; or

(iv) a person that operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(2) "Asset" means property of a debtor, but the term does not include:

(i) property to the extent it is encumbered by a valid lien;

(ii) property to the extent it is generally exempt under nonbankruptcy law; or

(iii) an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.

(3) "Claim", except as used in "claim for relief", means a right to payment, whether or not the right is reduced

to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(4) "Creditor" means a person that has a claim.

(5) "Debt" means liability on a claim.

(6) "Debtor" means a person that is liable on a claim.

(7) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(8) "Insider" includes:

(i) if the debtor is an individual:

(A) a relative of the debtor or of a general partner of the debtor;

(B) a partnership in which the debtor is a general partner;

(C) a general partner in a partnership described in clause (B); or

(D) a corporation of which the debtor is a director, officer, or person in control;

(ii) if the debtor is a corporation:

(A) a director of the debtor;

(B) an officer of the debtor;

(C) a person in control of the debtor;

(D) a partnership in which the debtor is a general partner;

(E) a general partner in a partnership described in clause (D); or

(F) a relative of a general partner, director, officer, or person in control of the debtor;

(iii) if the debtor is a partnership:

(A) a general partner in the debtor;

(B) a relative of a general partner in, a general partner of, or a person in control of the debtor;

(C) another partnership in which the debtor is a general partner;

(D) a general partner in a partnership described in clause (C); or

(E) a person in control of the debtor;

(iv) an affiliate, or an insider of an affiliate as if the affiliate were the debtor; and

(v) a managing agent of the debtor.

(9) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.

(10) "Organization" means a person other than an individual.

(11) "Person" means an individual, estate, partnership, association, trust, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal or commercial entity.

(12) "Property" means anything that may be the subject of ownership.

(13) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(14) "Relative" means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.

(15) "Sign" means, with present intent to authenticate or adopt a record:

(i) to execute or adopt a tangible symbol; or

(ii) to attach to or logically associate with the record an electronic symbol, sound, or process.

(16) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, license, and creation of a lien or other encumbrance.

(17) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

UNIF. VOIDABLE TRANSACTIONS ACT § 4 (1984)

SECTION 4: TRANSFER OR OBLIGATION VOIDABLE AS TO PRESENT OR FUTURE CREDITOR.

(a) A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(ii) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

(b) In determining actual intent under subsection (a)

(1), consideration may be given, among other factors, to whether:

(1) the transfer or obligation was to an insider;

(2) the debtor retained possession or control of the property transferred after the transfer;

(3) the transfer or obligation was disclosed or concealed;

(4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) the transfer was of substantially all the debtor's assets;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) the debtor transferred the essential assets of the business to a lienor that transferred the assets to an insider of the debtor.

(c) A creditor making a claim for relief under subsection (a) has the burden of proving the elements of the claim for relief by a preponderance of the evidence.

UNIF. VOIDABLE TRANSACTIONS ACT § 5 (1984)

SECTION 5: TRANSFER OR OBLIGATION VOIDABLE AS TO PRESENT CREDITOR.

(a) A transfer made or obligation incurred by a debtor is voidable as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(b) A transfer made by a debtor is voidable as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

(c) Subject to Section 2(b), a creditor making a claim for relief under subsection (a) or (b) has the burden of proving the elements of the claim for relief by a preponderance of the evidence.